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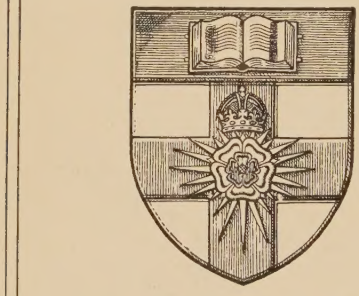

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LAW REPORTS.

Court of Common Pleas.

REPORTED BY

JOHN SCOTT AND HENRY BOMPAS,

BARRISTERS-AT-LAW.

EDITED BY

JAMES REDFOORD BULWER, Q.C.

VOL. III.

FROM MICHAELMAS TERM, 1867, TO TRINITY TERM, 1868,

BOTH INCLUSIVE.

XXXI VICTORIA.

LONDON:

PRINTED FOR THE COUNCIL OF LAW REPORTING

BY WILLIAM CLOWES AND SONS,

DUKE STREET, STAMFORD STREET; AND 14, CHARING CROSS.

PUBLISHING OFFICE, 51, CAREY STREET, LINCOLN'S INN, W.C.

1868

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CASES

DETERMINED BY THE

COURT OF COMMON PLEAS

AND BY THE

COURT OF EXCHEQUER CHAMBER,

ON ERROR AND APPEAL FROM THE COURT OF COMMON PLEAS,

IN AND AFTER

MICHAELMAS TERM, XXXI VICTORIA.

THE CONFLANS STONE QUARRY COMPANY (LIMITED) *v.* PARKER, PUBLIC OFFICER OF THE NATIONAL BANK.

1867
Nov. 5.

Circular Notes, Loss of—Money had and received—Failure of Consideration.

The plaintiffs, through an agent, obtained from the defendants, bankers in London, circular notes payable by certain correspondents of the defendants at various foreign towns mentioned in a "letter of indication," which accompanied the circular notes. The letter of indication and the circular notes were transmitted by the agent, by post, to the plaintiffs in Paris; the letter of indication was duly received by them, but the circular notes were lost in the transit:—

Held, that, as the defendants might possibly still be called upon to pay the circular notes, the plaintiffs, apart from any equitable relief to which they might be entitled upon giving a proper indemnity, were not entitled to recover the money which their agent had paid to the defendants upon tendering the letter of indication only.

THE declaration was for money payable by The National Bank to the plaintiffs, for money lent, money paid, money received, interest, and money found to be due on accounts stated.

Plea, never indebted. Issue thereon.

The cause was tried before Bovill, C.J., at the sittings in London after last Hilary Term, when the following facts appeared in evidence:—

The plaintiffs are a joint-stock company established for the

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working of certain stone quarries in France. The defendant is one of the registered public officers of The National Bank. On the 23rd of May, 1866, one M'Colla, the managing director of the company, called at the Charing-cross branch of the National Bank, and asked for circular notes for 80*l.* payable to Jean Baptiste Rembeaux, the company's agent at Paris, as a mode of remitting that sum to him. A clerk of the bank accordingly handed M'Colla eight circular notes for 10*l.* each, together with a "letter of indication," receiving from him in exchange 80*l.* in Bank of England notes. Neither M'Colla nor Rembeaux was a customer of or known to the bank. The circular notes were in the following form:—

"THE NATIONAL BANK.

"No. 2663. Lettre de Credit Circulaire pour £10 0 0 Sterlg.

"Londres, ce 23 Mai, 1866.

"A Messieurs les banquiers designés
dans nos Lettres d'Indication.

"Messieurs,—Cette lettre vous sera remise par M. —— dont vous trouverez la signature dans notre lettre d'indication sousdite. Je vous prie de vouloir bien lui compter sans frais quelconques la valeur de dix livres sterling au cours d'usance sur Londres, contre sa traite ci-jointe sur cette banque.

"J'ai l'honneur d'être, Messieurs,

"Votre très obeissant serviteur,

"—— Secrétaire." "JOHN PARKER, Gérant."

At the back was printed the following form of draft on the National Bank:—

"THE NATIONAL BANK.

"£10 0 0 London.

"A sept jours de vue préfix payez à l'ordre de M. —— dix livres sterling, valeur recue à ——

"Ce ——, 1866."

The letter of indication which accompanied the circular notes was as follows:—

"LETTRE D'INDICATION.

"The National Bank.

"Londres, ce 23 Mai, 1866.

"Messieurs,—Le porteur de cette lettre, M. ——, pour lequel

nous réclamons vos attentions, est muni de nos billets de change circulaires pour son voyage. Nous vous prions de lui en fournir la valeur sur son double acquit au cours du change à usance sur notre place, et sans déductions de frais.

"Si la ville où il en touchera le montant n'a pas de change direct sur Londres, vous voudrez bien en combiner un avec la place cambiste la plus voisine.

"Vous observerez que tout agio sur espéces d'or ou d'argent, et tous frais extraordinaires dans le cas d'un remboursement indirect, doivent être supportés par le porteur, et ne peuvent être à notre charge.

"Cette lettre devant accompagner nos billets circulaires doit rester dans les mains de leur porteur jusqu'à leur épuisement.

"Nous avons l'honneur d'être, Messieur,

"Vos très humbles et très obeissants serviteurs,

"(Signature du porteur) "————, Secrétaire,

"————." "————, Gérant."

At the back of the letter of indication was conspicuously printed in red ink the following:—

"Particular attention is requested to the following note.

"The bearer of this letter is requested to insert his usual signature in the blank space at the foot of the letter before setting out, as an indespensable precaution against forgery, should the circular notes fall into improper hands. He should also be careful to keep this letter apart from the notes; and he is particularly requested not to indorse them, except in the presence of the banker of whom payment is required. The full amount, at the current rate of exchange, will then be paid without any deduction in respect of commission.

"It is essential that the name of the place where each note is changed, and the date, should be inserted in the blank spaces in the bill at the back of the note."

The names and addresses of 184 banking firms in various cities and towns in Europe and in Asia were appended to the letter of indication as the persons to whom it was addressed.

M'Colla, on the day upon which he received them, transmitted by post to Rembeaux the letter of indication and the circular notes, inclosed in two separate envelopes. The envelope containing

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the letter of indication was duly received by Rembeaux; but that which contained the eight circular notes was lost or stolen, and never reached its destination. The non-arrival of the circular notes having been communicated to him by Rembeaux, M'Colla, on the 12th of July, 1866, applied to the National Bank to return him the 80*l.* which he had paid for them, tendering them the letter of indication only. The bank declined to restore the money unless they received an indemnity. This M'Colla on behalf of the plaintiffs was willing to give, but not in the form required by the bank: and thereupon this action was brought on the 11th of October.

For the defendants it was insisted that the money had been deposited upon a contract to repay it on the presentation of drafts (signed by Rembeaux) upon any of the correspondents whose names were attached to the letter of indication, and in foreign money, and not at the bank in London; and that, if the plaintiffs had any equity to reclaim the money here, it could at all events be only upon proof that the circular notes had been lost or destroyed, and upon giving the bank a satisfactory indemnity.

His lordship nonsuited the plaintiffs, reserving them leave to move to enter a verdict for the amount claimed.

F. M. White, in Easter Term last, accordingly obtained a rule nisi, on the grounds that the circular notes and the letter of indication were a machinery by which the money deposited with the bank was to be paid; that there was no obligation upon the plaintiffs to use the machinery for the purpose of drawing out the money; that the money paid in was deposited to be drawn out by Rembeaux's drafts upon the defendants' bank, and that, until Rembeaux had drawn the drafts, or that purpose was answered, the money was held to the use of the plaintiffs; that Rembeaux was agent to the plaintiffs, and for the purposes of the case to be treated as the plaintiff; that the money was deposited with the National Bank as bankers, and that the foreign bankers were merely agents of the bank to honour the drafts of Rembeaux, as agent for the plaintiffs, drawn abroad upon the National Bank, to the amount named in the circular notes; that the letter of indication and the circular notes were parts of one document, and one

part was of no value without the other, nor could the loss of one prejudice the National Bank, if the other were restored to their possession; that the circular notes and letter of indication together amounted to a request made by the National Bank to the bankers named in the letter of indication in the plaintiffs' favour, to honour the drafts of their agent Rembeaux on the National Bank, to the amount of 80*l.*; that this request and authority could be renounced by the plaintiffs, in whose favour they were made and given, at any time, provided that nothing had been done to prejudice the National Bank, and that the tender of the letter of indication was a sufficient and valid renunciation; that the blank forms until signed by Rembeaux as drawer were not bills of exchange at all, and of no value; that the consideration for which the money was paid in had failed; that the burden of proof lay upon the bank to shew that the purpose for which the money had been paid in or deposited had been answered, and that there was no evidence of this; that, under the circumstances, the money was in some form of action, at any rate after tender of the letter of indication and the indemnity which was tendered, recoverable from the bank. The following cases were referred to:— *Orr* v. *Union Bank of Scotland* (1); *British Linen Company* v. *Caledonian Insurance Company.* (2)

May 28. *J. Brown, Q.C.*, and *J. P. Murphy* shewed cause. This was not the ordinary case of a deposit of money with a banker, so as to support a count for money lent: *Pott* v. *Clegg.* (3) Neither was there any failure of consideration, to sustain the count for money had and received. It was simply the case of a deposit of money upon a special contract to repay it abroad through the medium of one of the bankers whose names were contained in the letter of indication, upon presentment of the circular notes, and in foreign money. Suppose the plaintiffs' agent, M'Colla, had taken the circular notes to a branch of the National Bank at Liverpool or Manchester, would the manager have been justified in paying him the money there? That would have raised very much the same question upon which there was such a diversity of opinion amongst the judges in *Rowe* v. *Young* (4), and which was ulti-

(1) 1 Macq. 513.
(2) 4 Macq. 107.
(3) 16 M. & W. 321.
(4) 2 B. & B. 165.

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mately settled by the House of Lords. A man who contracts to pay money at one place cannot be called upon to pay it at another place. Great inconvenience would arise if the law were otherwise. For instance, a person contemplating a voyage to Constantinople goes to a Turkey merchant and obtains from him drafts upon his correspondents there for a large amount, and then, having abandoned the intended voyage, tenders the drafts here and demands back his money,—might not the merchant well say that he has made arrangements for payment of the drafts according to the original intention, and decline to return the money as demanded? In the present case, seeing the great number of correspondents through whom the circular notes might be paid, the defendants would never be safe so long as any of them were outstanding. The case of *Orr* v. *Union Bank of Scotland* (1), the ground of the decision in which is well stated by Lord Campbell, C. (2), is an authority in favour of the defendants.

[MONTAGUE SMITH, J. The most material case you have to deal with is *British Linen Company* v. *Caledonian Insurance Company.* (3)]

That was the case of a letter of credit, and very peculiar in its circumstances. The money was paid to the bankers for the purpose of being paid out upon the drafts of one King. They paid it upon a forged draft: and the House of Lords decided that this was no discharge of their liability upon the letter of credit. There is little to be found in the books upon the subject of letters of credit. They seem generally to have been put upon the same footing as bills of exchange: Story on Bills, s. 459: *In re Agra and Masterman's Bank, Ex parte Asiatic Banking Corporation.* (4) There is, however, no analogy between that description of document and circular notes. The money having been deposited with the bank in exchange for valuable securities which are still outstanding, it cannot be recovered back under the count for money had and received, inasmuch as the bank cannot be placed in statu quo. Even in the case of a lost bill of exchange (assuming that the custom of merchants applies to documents of this description), until the enactment in s. 87 of the Common Law Procedure Act, 1854 (17 & 18

(1) 1 Macq. 513.
(2) 1 Macq. at p. 520.
(3) 4 Macq. 107.
(4) Law Rep. 2 Eq. Ap. 391.

Vict. c. 125), the indorsee could not recover upon it at law, even upon tendering an indemnity: *Hansard* v. *Robinson* (1); *Ramuz* v. *Crowe* (2); *Crowe* v. *Clay.* (3) "The acceptor," says Lord Tenterden in *Hansard* v. *Robinson*, at p. 94, "paying the bill, has a right to the possession of the instrument for his own security, and as his voucher and discharge pro tanto in his account with the drawer. . . . As far as regards his voucher and discharge towards the drawer, it will be the same thing whether the instrument has been destroyed or mislaid." The party, however, was not without remedy; for, he might always have enforced payment in a court of equity, upon tendering a proper indemnity: *Walmsley* v. *Child.* (4)

Coleridge, Q.C., and *F. M. White*, in support of the rule. Upon the face of the documents themselves there is no contract between the plaintiffs and the defendants; but the contract is to be collected from these and the surrounding circumstances; and it is in substance this, to repay the money upon request, with a superadded obligation to pay the money in a particular way, viz. through one of the indicated correspondents abroad, if required so to do. The nature of a letter of credit (which this transaction very much resembles) is thus defined in Bell's Commentaries, B. 3, ch. 2, s. 4, page 341, 5th edit., — a definition which is adopted by Story on Bills, s. 463:—"Letters of credit, strictly speaking, are mandates, giving authority to the person addressed to pay money or furnish goods on the credit of the writer. They are generally made use of for facilitating the supply of money or goods required by one going to a distance or abroad, and avoiding the risk and trouble of carrying specie or buying bills to a greater amount than may be required. The debt which arises on such a letter, in its simplest form, when complied with, is between the mandatory and mandant; though it may be so conceived as to raise a debt also against the person who is supplied by the mandatory. Where the letter is purchased with money by the person wishing for the foreign credit (the payee), or is granted in consequence of a check on his cash account, or procured on the credit of securities lodged with the person who grants it, or in payment of money due by him to the payee, the letter is in its effects similar

(1) 7 B. & C. 90.
(2) 1 Ex. 167.
(3) 9 Ex. 604; 23 L. J. (Ex.) 150.
(4) 1 Ves. sen. 341.

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to a bill of exchange drawn on the foreign merchant. The payment of the money by the person on whom the letter is granted raises a debt, or goes into account between him and the writer of the letter, but raises no debt to the person who pays on the letter, against him to whom the money is paid." A similar definition is given in Com. Dig. Merchant (F. 3.), and in Bell's Principles of the Law of Scotland, 5th ed. s. 279.

[WILLES, J. The document is not negotiable. It becomes a bill of exchange only on re-draft.]

In Pothier's Traité du Contrat de Change, s. 236, it is said: "Il y a une espèce de rescription qu'on appelle lettre de credit, par laquelle un marchand ou banquier mande à son corréspondent dans un autre lieu de compter à la personne dénommée dans la lettre l'argent dont elle témoigne avoir besoin. On donne ces sortes de lettres de crédit à des personnes qui voyagent, pour qu'elles n'aient pas la peine de porter trop d'argent avec elles. Ces lettres sont quelques fois illimitées, quelquesfois limitées à une certaine somme. Elles ne contiennent qu'un seul mandat, par lequel celui qui a écrit la lettre charge celui à qui elle est addressée de compter la somme à la personne dénommée. Le porteur de la lettre n'est point censé se charger de recevoir, il n'use de la lettre que selon son besoin et autant que bon lui semble, et il ne contrate d'obligation qu'en recevant l'argent qui est l'obligation du contrat de prêt, qui se fait par la numération qui lui est fait de l'argent." If the bearer of the letter of credit is not bound to require the whole sum mentioned therein at the place or places indicated, it follows that he is entitled to recover back the balance from the person with whom and at the place where the deposit was originally made. In Byles on Bills, 8th ed. 351, it is said: "It is now clear that if a bill, note, or cheque, negotiable either by indorsement or by delivery only, be lost, no action will lie at the suit of the loser against any one of the parties to the instrument, either on the bill or note itself, or on the consideration." For this is cited *Bevan* v. *Hill* (1) and *Crowe* v. *Clay*. (2) The distinction between bills or notes which are in a negotiable state when lost, and those which are not, is also noticed in Grant on Banking, 422, Chitty on Bills, 100 *f*, and 2 Parsons on Bills, 295.

(1) 2 Camp. 381. (2) 9 Ex. 604; 23 L. J. (Ex.) 150. 18 Jan 65

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Here, the circular notes when lost were in an incomplete state, and never could be made the foundation of a legal claim against the bank. Without the signature of Rembeaux they were not negotiable.

[MONTAGUE SMITH, J. The foreign correspondents are requested to pay to the person who signs the letter of indication. If they paid without requiring to see the signature, could they recover against the National Bank?]

It is submitted that they could not. The cases of *Orr* v. *Union Bank of Scotland* (1) and *British Linen Company* v. *Caledonian Insurance Company* (2) are not identical in their facts with the present case; but the dicta of the learned lords who took part in those decisions have an important bearing, as shewing the principles by which this question is to be governed, viz. that the money, having been deposited with the bank for a purpose which has not been answered, even though they might have been induced to part with it by means of a forgery, must still be considered as remaining in their hands to the order of the person in whose favour the letter of indication and the circular notes were given; and that the machinery of the circular notes was adopted merely for the purpose of having the money paid at any of the places indicated in the letter, at the option of the bearer, instead of here. And this is the common and known course of business. The only indemnity which the bank could be entitled to is, an indemnity against *legal* liability on the circular notes, not against illegal claims or the expenses of inquiry and investigation. They may protect themselves against fraud by communicating with their correspondents.

Cur. adv. vult.

Nov. 5. (3) The judgment of the Court was delivered by

BOVILL, C.J. This case was argued in Trinity Term last, before my brothers Willes, Montague Smith, and myself. It was an action brought to recover the amount of eight circular notes issued by the defendants to the plaintiffs, and which were lost without being used. The circular notes were procured by an agent of the plain-

(1) 1 Macq. 513.
(2) 4 Macq. 107.
(3) Formal judgment in favour of the defendant was given on the 8th of July last, but the Court deferred giving their reasons until this term.

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tiffs for their use, and paid for with their money. They were issued and dated the 23rd of May, 1866, signed by the defendants' manager, and addressed to the defendants' correspondents abroad, under the general description of "the bankers mentioned in our letter of indication." The name of Rembeaux, an agent of the plaintiffs, was filled into the circular notes as that of the person who was to get them cashed. The circular notes were in the usual form, for 10*l.* each, and on the back was the usual blank form of draft to be filled in and signed when the circular note was cashed. The usual letter of indication, stating the names of the foreign correspondents, and requesting them to cash the circular notes, was issued with them. Rembeaux's name was filled into the body of the letter, but it was not signed by him. The plaintiffs' agent forwarded the letter of indication and circular notes by post to Paris, addressed to Rembeaux, for the plaintiffs' use abroad. The letter of indication arrived safe; the circular notes did not; and no trace of them has been found. Whether their loss was caused by accident or design, and whether by fault of the post or otherwise, does not appear. On the 12th of July, 1866, the plaintiffs informed the defendants of the loss, offered to return the letter of indication, and demanded a return of the amount paid. A correspondence followed, which ended in a difference as to the proper indemnity to be given; the defendants being then willing to return the amount upon receiving an indemnity of a very extensive character, and the plaintiffs objecting to its terms. This action was thereupon brought: and upon the above facts appearing in evidence at the trial before me, the plaintiffs were nonsuited, with leave to move to enter a verdict for them. A rule was accordingly obtained, and the argument took place in the last Trinity Term, before my brothers Willes and Montague Smith and myself, when we took time to consider.

Upon the true construction of the letter of indication and circular notes, we are of opinion that it is not obligatory upon the holder to cash the circular notes, though he purchases a right to do so if he thinks proper; and that, in the event of his not requiring to use them abroad, he may, after reasonable notice of his electing not to use them, require repayment at the banker's hands.

This is not inequitable in itself. The banker is repaid by the use of the money, and the holder is in no other condition in this respect than the holder of a simple letter of credit, which has always been understood as giving an option to, not imposing an obligation upon, the bearer to cash his credit to the full amount expressed. In the case of such a letter of credit, he would draw bills upon his banker for the amount advanced, which amount the foreign banker would or ought to indorse upon the letter of credit, which the holder would retain until it was exhausted. In this more modern, and, in some respects, more convenient form of effecting the same object, the holder cannot require less than the amount of a circular note, and he is not bound to cash all or any of the circular notes which he has paid for, unless he thinks proper.

That being so, it follows that the holder has the option of either cashing the notes with any one of the indicated foreign correspondents of the banker, or, if he find no occasion to use them, of reclaiming the amount (whether with any and what allowance of discount it is unnecessary to consider) of the banker himself. How, then, is this option to be exercised, and under what conditions? The written documents furnish no direct answer; but it is plainly to be read in the character of the transaction itself; and it is that the option to have back the money from the banker cannot be exercised so long as the holder of the circular notes retains the power of procuring cash thereupon from the banker's correspondents; in other words, that the circular notes must in all ordinary cases be returned to the banker, and that he cannot be called upon to return the amount so long as the notes are outstanding, so that he may also be called upon to pay a correspondent who has cashed them. In this respect, it seems impossible that the secondary inferred obligation to return the money if the circular notes be not used can be larger than the primary express obligation that the notes shall be cashed if produced to one of the indicated correspondents.

Was there, then, and is there, in this case, a possibility that the bank may be called upon to pay these notes? We think there was and is; and that the existence of such liability is inconsistent with an obligation to return the money. If the circular notes should turn up, and get into Rembeaux's hands, it would be

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in his power, if (which we are far from suggesting) he were a dishonest man, to procure them to be cashed by any of the indicated correspondents of the bank, who would thereupon have recourse against the bank. The possession of the letter of indication would not preclude such a proceeding. The correspondent who cashes a circular note ought to, and commonly does, for his own protection, look at the letter of indication, for the purpose of identifying the holder of the circular note; but his doing so is not made a condition precedent. If he cashes the circular note for the person mentioned in the letter of indication, he has recourse against the banker, although from civility, over-confidence, or mere omission, he may not have asked for the letter of indication. And, on the other hand, if, after the letter of indication has been properly filled in by the rightful owner with his signature, a foreign correspondent cashes a circular note for a thief, who has succeeded in stealing the letter of indication and circular note, and in forging the name of the holder, no care in looking at the letter of indication can eke out a right to recover against the banker, as upon a payment to the right person.

The authorities referred to upon the argument, decided by the House of Lords, upon appeal from Scotland, viz. *Orr* v. *Union Bank* (1), and *British Linen Company* v. *Caledonian Insurance Company* (2), were cases in which ordinary letters of credit were given, and payments were made to fraudulent persons, who obtained possession of the letters of credit, and by personation or pretences of authority imposed upon the correspondents of the bank. In those cases, the letters of credit were given up to such correspondents with forged indorsements. In each case the bank was held liable to refund. In neither of them was there any possibility that the bank or its correspondents could be made to pay over again upon the letter of credit.

It was suggested that the bank might protect itself by sending notices to its correspondents not to pay the particular circular note. But, assuming that they were bound to incur this expense and trouble, by reason of the misfortune of the loser of the notes (for which we can see no pretext) the protection thereby afforded would not be an adequate one. It would impose upon every one

(1) 1 Macq. 513. (2) 4 Macq. 107.

of their correspondents the necessity of searching the forbidden list every time a circular note was presented for payment, and expose every holder of such notes to scrutiny and annoyance, and every one of the latter who had the same or a like name with that in the black list, to serious inconvenience. And, moreover, a slip or inadvertence occurring upon a busy day, or when the ordinary cashier was out of the office, might lead to such notes being cashed after all; when the loss, in case repayment had taken place, must fall on either the banker or his correspondent, whose interest he is bound to respect.

We are not dealing with the case of an accidental destruction, so that the notes could not come forward. When that case arises, it may be material to consider whether the indorsement upon the circular note, not being a bill of exchange before it is filled up, yet falls within the same rule, which we need not stop to consider. This is the case of circular notes, which, for aught that appears, are existing in the hands of some one who may seek to make them available, and may succeed in doing so, if he can induce Rembeaux to collude with him.

For these reasons, we think there was no obligation to refund simpliciter. It was, however, urged that at all events the bank was liable to refund, sub modo; that is to say, upon being indemnified against the outstanding circular notes; and it was said that a proper indemnity had been tendered. The general proposition was hardly contested; but the sufficiency of the indemnity was denied. Upon this point, however, it is unnecessary to say more than that, if the claim were founded upon an equity to be relieved against the consequence of an accidental loss of the circular notes, upon giving a sufficient indemnity, such claim could only be enforced in a Court of common law by application before the trial, under the 87th section of the second Common Law Procedure Act (17 & 18 Vict. c. 125), to the Court, or a judge, to order that the loss of the instruments should not be set up, provided an indemnity were given to the satisfaction of the Court, or a judge, or a master, against the claim of any other person upon such instruments: and, that course not having been adopted, all we are called upon to decide upon the present occasion is, that, apart from any equitable relief to which the plaintiffs may be entitled upon giving a

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proper indemnity, they are without recourse against the defendants.

The nonsuit was therefore right, and the rule to set it aside and enter a verdict for the plaintiffs is discharged.

Rule discharged.

Attorney for plaintiffs: *Alfred Jones.*

Attorneys for defendants: *Tatham & Son.*

Nov. 9.

CZECH AND ANOTHER *v.* THE GENERAL STEAM NAVIGATION COMPANY.

Ship and Shipping—Bill of Lading—Negligence—Onus of Proof.

Goods were shipped on board a steamer under a bill of lading which contained an exception from liability for "breakage, leakage, or damage." The goods were found at the end of the voyage to be injured by oil. It was proved that there was no oil in the cargo, but that there were two donkey engines on deck, near the place where the goods were stowed, in lubricating which oil was used; there was no direct evidence of how the injury to the goods occurred. In an action against the shipowners:—

Held, that the exception did not protect the shipowners from liability for damage accruing through the negligence of their servants, but that it did shift the onus of proof, and that it was incumbent upon the plaintiffs to prove affirmatively the negligence of the defendants' servants:—

Held, also, that the above facts were evidence upon which a jury were justified in finding the existence of negligence.

DECLARATION. That the defendants were owners of a steam ship in parts beyond the sea, and that the plaintiffs at their request caused to be shipped on board the ship certain goods, then in good order and well-conditioned, to be by the defendants stowed and carried in the ship from Hamburgh to London, and there safely and securely delivered in the like good order and condition to the plaintiffs and assigns, all and every dangers and accidents of the seas, and of navigation of whatsoever nature or kind soever excepted, he or they paying freight for the same then agreed on. Averment, that the defendants received the goods, and by their negligence and not by any of the excepted perils, failed to deliver them to the plaintiffs in the like good order and condition.

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Pleas: 1. That the defendants did not receive the goods as and on the terms alleged. 2. Not guilty. 3. That they received the goods subject to the following conditions and exceptions: "The act of God, molestation of war, fire, machinery, boilers, steam, and every other danger and accident of the seas, rivers, and steam navigation of whatsoever nature and kind excepted, weight and contents unknown; the said goods to be free of breakage, leakage, and damage;" and that they were not delivered in like good order and condition by reason of the excepted perils, dangers and accidents, and the damage was damage of which the goods were to be free. Issue thereon.

The cause was tried before Byles, J., at the sittings in London after Hilary Term, when the following facts were proved. The plaintiffs delivered to the defendants several bales of cotton goods to be carried from Hamburg to London, under a bill of lading which contained the following exceptions: "The act of God, molestation of war, fire, machinery, boilers, steam and every other dangers and accidents of the seas, rivers and steam navigation of whatsoever nature and kind excepted; weight and contents unknown; the said goods to be free of breakage, leakage and damage." The goods were safe when sent on board the defendants' steamer, but on reaching London one of the packages was found to be injured by some fluid, which was stated by several of the witnesses to have been oil, or oil and water. It was proved that the voyage was a good one, and without accident, and that there was no oil in the cargo; but that on the deck over the place where the package had been stowed, there were two cranes worked by donkey engines, which were lubricated from time to time with oil.

No other evidence was given as to the way in which the injury occurred. The jury gave a verdict for the plaintiffs for 26*l.*, and leave was given to the defendants to move to enter a verdict for them on the ground that there was no evidence of negligence.

Montagu Chambers, Q.C., having obtained a rule nisi accordingly, *Henry James* and *Philbrick* shewed cause. It has been repeatedly decided that a general clause, such as that contained in the present bill of lading, does not exempt the shipowner from liability in respect of damage accruing through his own negligence:

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Phillips v. *Clark* (1), *Grill* v. *General Steam Navigation Company*. (2) The defendants contend that the plaintiffs must shew the particular act of negligence which occasioned the injury; but it is for them to bring themselves within the exception, without which they would be clearly liable. It is at any rate sufficient for the plaintiffs to shew that the injury was the result of circumstances which could not have occurred if there had been no want of care on the part of the defendants. In *Scott* v. *London and St. Katherine Dock Company* (3), where the injury was one which did not usually occur without negligence, it was said that under such circumstances it was for the defendants to shew that there was no negligence, and not for the plaintiffs to shew that there was negligence. The same law is laid down in *Hammack* v. *White*. (4) There can be little doubt that the injury here occurred from a careless use of oil in oiling the machinery, and *Byrne* v. *Boadle* (5), shews that if the defendants have the greater means of knowledge, it is for them to give evidence as to the cause of the injury, and such is the case here. See also *Great Western Railway Company of Canada* v. *Fawcett*. (6)

[WILLES, J. That case has been much remarked on. The late chief justice of this Court (Erle, C.J.), protested against the onus of proof in such a case being thrown on the railway company.]

Montagu Chambers, and *Cohen*, supported the rule. The plaintiffs should have shewn the way in which the injury occurred in order to prove negligence: *Bird* v. *Great Northern Railway Company*. (7) The oil, if that was really the cause of the injury, might have dripped from the machinery by an unavoidable accident without any negligence, and if the facts are equally consistent with the presence or absence of negligence, the case ought not to be left to the jury: *Cotton* v. *Wood*. (8) The bill of lading, in the present case, is peculiar on account of the words "free of damage;" these must have some meaning given them, while, if the plaintiffs' con-

(1) 2 C. B. (N. S.) 156; 26 L. J. (C.P.) 168. 3 Jur. N.S. 467
(2) Law Rep. 1 C. P. 600. 12 Jur. N.S. 727
(3) 3 H. & C. 596; 34 L. J. (Ex.) 177. 11
(4) 11 C. B. (N. S.) 588; 31 L. J. (C.P.) 129. 10 Jur. N.S. 796. 11 Jur. N.S. 264
(5) 2 H. & C. 722; 33 L. J. (Ex.) 13. 10 Jur. N.S. 1107.
(6) 1 Moore P. C. (N. S.) 101.
(7) 28 L. J. (Ex.) 3.
(8) 8 C. B. (N. S.) 568; 29 L. J (C.P.) 333. 7 Jur. N.S. 168.

tention were correct, they would have none, as the existence of damage would prove negligence and so prevent the shipowner from being exempted from liability. The true effect of the clause is to exempt the shipowner from liability unless actual negligence is proved. That was laid down in *Peninsular and Oriental Steam Navigation Company* v. *Shand* (1), from which the present case cannot be distinguished. In a later case, *Ohrloff* v. *Briscall* (2), it was held that no gross negligence being proved, the shipowner was not liable. Here the only evidence of negligence was the existence of the injury which might have been occasioned by an imperfection in the machinery, or by other accident, as well as by the negligence of the defendants' servants.

BOVILL, C.J. In this case it has been contended that there is no evidence of negligence, or that, if there is any, the defendants are exempted from liability by the terms of the bill of lading. The case of *Phillips* v. *Clark* (3), shews that if there is evidence that the injury was caused by the negligence of the defendants' servants, the defendants are liable notwithstanding the exception in the bill of lading, and the case of *Ohrloff* v. *Briscall* (2), where there was a similar exception in the bill of lading is strictly in accordance with that decision. The matter, in fact, was in discussion in this Court a few days ago in the case of *Leuw* v. *Dudgeon* (4), in

(1) 3 Moore P. C. (N. S.) 272.

(2) Law Rep. 1 P. C. 231.

(3) 2 C. B. (N. S.) 156; 26 L. J. (C.P.) 168.

(4) *Leuw* v. *Dudgeon* (1). This was an action on a bill of lading of cattle, to be carried from Rotterdam to London, which contained an exemption in the following terms:—"Ship free in case of mortality, and from all damage arising from act of God, the Queen's enemies, fire, accidents from machinery, or boiler, steam, or other dangers of the seas, rivers, roadsteads, or steam navigation whatsoever. The owners of the vessel will not be liable for the loss of or injury done to any horses, cattle, or other animals, except as to 50*l.* for horses, 15*l.* per head of veal cattle, and 2*l.* per head as to sheep, pigs, and dogs. The owners will not be liable for any loss arising from suffocation, or other causes occurring to horses, dogs, cattle, and other animals; or from kicking, plunging, or viciousness of the same in transit, nor for any damage arising from shipping or landing, or while in the possession of the owners or their agents before or after the voyage, from whatever cause they may remain in such possession."

Several of the cattle were suffocated and killed from the vessel overturning, it having been sent to sea without proper ballast. The Court held, that the injury having been occasioned by the negligence of the defendants, the plaintiff was entitled to recover,

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which the exception in the bill of lading certainly in terms covered the cause of injury, viz., the suffocation of the cattle; but the injury having been occasioned by the negligence of the defendant, we held him liable in accordance with the above decisions. The case of *Peninsular and Oriental Steam Navigation Company* v. *Shand* (1), has been much pressed on us for the defendants; but in that case there was no proof whatever of negligence, and the existence of negligence had not been found by the Court below, and Lord Justice Turner said, in delivering judgment:—"The facts of this case make it unnecessary to consider whether, reasonably understood, they express an intention to protect the appellants against answering for gross negligence, or positive misconduct." The case, therefore, is not at variance with the other cases I have mentioned. I fully agree that it is not sufficient to prove injury to the cargo to charge the defendants, but that there must be proof of negligence on the part of the defendants or their servants; and the question here is, whether there was evidence of that which could rightly be left to the jury? There was certainly evidence that the injury occurred while the goods were on board the ship, and was occasioned by oil, or oil and water, and it was for the jury to say whether such was the case, and after the verdict, we must take it that it was. It was for the jury to say how the injury occurred; there was no oil in the cargo, and nothing in the state of the ship which the defendants could suggest as the cause of the injury. Oil must have been used about the machinery; and all the circumstances were for the jury, who have found that negligence was established to their satisfaction. The evidence in every case must vary according to its peculiar circumstances; but if the goods are damaged, and no reasonable explanation of the damage can be given except the negligence of the defendants, a jury are justified in finding that such negligence is proved.

WILLES, J. I am of the same opinion. It is not necessary in this case to decide that the words of the exception in the bill of lading have all the force attributed to them by the defendants,

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notwithstanding the exception in the bill of lading.

(1) 3 Moore's P. C. (N. S.) 272.

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and protect them from all damage which the plaintiffs cannot prove by evidence to arise from the negligence of the defendants. I will, however, assume that it is so for the purpose of this case, but it does not, therefore, restrict the plaintiffs as to the nature of the evidence by which such negligence shall be proved. To explain this by an illustration. If a shipment of sugar took place under a bill of lading, such as the present one, and it was proved that the sugar was sound when put on board, and had become converted into syrup before the end of the voyage, if that was put as an abstract case I think the shipowner would not be liable, because there may have been storms which occasioned the injury, without any want of care on the part of the captain or crew; the injury alone, therefore, would be no evidence of negligence on their part. But if it was proved that the sugar was damaged by fresh water, then there would be a strong probability that the hatches had been negligently left open, and the rain had so come in and done the injury, and, though it would be possible that some one had wilfully poured fresh water down into the hold, this would be so improbable that a jury would be justified in finding that the injury had been occasioned by negligence in the management of the ship. The evidence in the present case is very much of the same kind, and I think there was abundance upon which a jury might find that the negligence of the defendants was proved. The liability of the defendants for their negligence, notwithstanding the general words of the exception in the bill of lading, has been fully gone into in many cases which have been referred to by my lord, and I will only add that the law so laid down by our courts is consistent with the views of modern jurists, and will be found in many of the maritime codes of Europe. (1)

(1) The older authorities upon maritime law, are referred to in Casaregis, xxiii. 43, to shew that general exemptions, whether by law or contract, from liability for damage by accident, are limited to cases of accident without fault; and in modern codes, instances will be found in which this principle is adopted. Compare the project of a commercial code for Prussia, article 497, page 90, and the motives, page 272, with the German code of commerce (Allgemeines Deutsches Handels-Gesetzbuch) adopted by Prussia in 1861, articles 659 and 704. The civil code of New York (a work of very great acumen and learning), article 1141, annuls contracts which profess to exempt carriers by anticipation from liability for the gross negligence, fraud, or wilful wrong of themselves or their servants. According to the decision in

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BYLES, J. I am of the same opinion. Although the condition in the bill of lading in terms exempts the shipowner from liability for any damage, it is now decided that that must be read as if subject to the exception "if not occasioned by the negligence of the defendants." The question, therefore, is, whether there was evidence of such negligence? It might not have been sufficient to prove merely that the injury occurred on board the vessel; but it was shewn that the goods were injured by oil, and that they were in close proximity to engines, in lubricating which oil must have been used, and that no other oil was near them. It was also shewn that there was no defect in the engines, and no accident on the voyage. If all this did not amount to conclusive evidence, it certainly was strong primâ facie evidence, that the injury occurred through the negligence of the defendants.

KEATING, J., concurred.

Rule discharged.

Attorney for plaintiffs: *H. Lloyd.*
Attorneys for defendants: *Pearce, Phillips, & Co.*

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the text the exemption discharges the owner and master from liability until the damage is proved to have arisen from the fault of one of them, or of some person for whose conduct they are answerable, and in this, as other cases of bailment for hire, negligence or the want of reasonable care and diligence is fault. So is want of reasonable skill, imperitia adnumeratur culpa. The answer to the question whether the proof of damage is primâ facie proof of fault, must depend upon the circumstances; the mere proof of damage is obviously not enough to raise the presumption of fault in the crew, and yet there may be cases in which it could not have happened without their fault, or as to which it is so highly unlikely to have happened otherwise, that a jury may fairly come to the conclusion that it did so happen. The result of the decisions seems to be that the exemption in our law casts the burden of proving fault upon the party complaining.

SHEA *v.* UNITED ASSURANCE SOCIETY OF ST. PATRICK. 1867

County Court—Jurisdiction—Friendly Society—18 & 19 *Vict.* c. 63, s. 41. *Nov.* 13.

By section 41 of the Friendly Societies Act, 1855 (18 & 19 Vict. c. 63), jurisdiction is given in certain cases to the county court of the district in which the usual or principal place of business of the society is situated:—

Held, that the county court of any district in which any usual place of business of the society is situated, and not only that in which its principal place of business is situated, has jurisdiction under the act.

MORGAN LLOYD moved for a rule calling upon the plaintiff to shew cause why a prohibition should not issue to prevent her proceeding in this action in the Bloomsbury County Court, upon affidavits which shewed that the action was brought by the plaintiff on a policy of insurance alleged to have been effected by her late husband with the defendants, and that "the usual and principal place of business of the society" was in Liverpool.

The jurisdiction of the county courts in actions between benefit societies and their members is regulated by 18 & 19 Vict. c. 63, s. 41, and a county court can have no jurisdiction in such actions unless the usual and principal place of business of the society is within its district, and the affidavit shews that such is not the case here.

[BOVILL, C.J. The act says: "The usual *or* principal place of business of the society" must be within the district of the county court. Your affidavit does not negative that, but only that the usual *and* principal place of business of the society is so.]

The words do not refer to distinct places, for then it would be *a* usual or principal place of business, and not *the* usual or principal place of business. It has been held on the County Courts Act (9 & 10 Vict. c. 95), that a railway company can be said to carry on business only at its head offices and not at any of the other stations on the line. *Brown* v. *London and North Western Railway Company* (1), *Minor* v. *London and North Western Railway Company*. (2)

BOVILL C. J. I am of opinion that this rule ought not to be granted. The county court judge has jurisdiction if a *usual* place

(1) 11 W. R. 884. 10 Jur NS 284

(2) 1 C. B. (N.S.) 325; 26 L. J. (C.P.) 39. 2 Jur NS 1168.

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of business of the society is within the district of the county court and the affidavit only states that the usual *and principal* place of business of the society is in Liverpool, which is quite consistent with there being also a usual place of business of the society in London.

WILLES, BYLES, AND KEATING, JJ., concurred.

Rule refused.

Attorney for defendants: *R. W. Roberts.*

Nov. 25.

JOHNSON AND OTHERS *v.* MILLS AND OTHERS.

RE FOOT.

Costs — Ejectment—Liability of Co-defendants—Common Law Procedure Act, 1852 (15 & 16 *Vict. c.* 76), *ss.* 174, 205.

14 C.L.D. 191
18 Ch.D. 364
365-6-7

In an action of ejectment, in which there are several defendants, and the plaintiff succeeds, each of the defendants, although defending only for part of the premises claimed in the action, is liable for the whole of the plaintiff's costs.

THIS was a rule to review the Master's taxation.

The action was in ejectment to recover some land included in a building agreement which had become forfeited for breach of a covenant to repair, and writs were served on more than 100 under-tenants. The defendant Foot and four other under-tenants appeared, and the tenant under the building agreement, L. J. Parkes, also obtained leave to appear and defend, as their landlord. The defendant Foot limited his defence to one tenement, under the powers of the 174th section of the Common Law Procedure Act, 1852. Previous to the trial the defendant Foot gave notice to the plaintiffs that he should not appear thereat; but he did not confess judgment in accordance with the provisions of s. 205 of the Common Law Procedure Act, 1852. The case went down to trial, and a verdict was found and judgment entered for the plaintiff. The Master taxed the whole of the plaintiffs' costs against each of the defendants, including the cost of serving the writs on the other defendants, and other costs peculiar to them.

Pollock, Q.C., on behalf of Foot, having obtained a rule for the Master to review his taxation,

Denman, Q.C., A. Wills, and *Thesiger,* shewed cause. It is clear

that the rule which the Master has followed was the old rule, Buller's Nisi Prius, p. 335; Adams on Ejectment, p. 294. The Common Law Procedure Act, 1852, has not made any alteration; by s. 206 of that act, the costs are to be taxed according to the practice theretofore used, and ss. 207, 221, shew that it was intended to leave the practice and procedure in actions of ejectment the same as before, unless expressly altered. The defendant might have confessed judgment, and then, by s. 205, he would only have been liable for the expenses incurred by his own defence; but this he has not done; and the inference from that express provision is, that otherwise he is liable to the whole costs of the action.

[BOVILL, C.J. It is admitted that the defendant is liable to the whole of the general costs of the cause, the only question is with respect to costs incurred solely in relation to the other defendants. Do you say if a plaintiff included in one ejectment two houses which he claimed under wholly different titles, each defendant would be liable for the costs of both defences, though limiting his defence to his own house?]

In such a case the Court would interfere and stay the action, unless the plaintiff consented to treat it as two, and take separate costs for the two defences, which would then be taxed on the order. There can only be one allocatur on one judgment, and in this case there is only one judgment, and there cannot, therefore, be separate costs taxed against the several defendants.

Pollock, Q.C., and *F. M. White.* The practice before the Common Law Procedure Act, 1852, is referable to one case: *Thrustout* v. *Foot* (1), and the judges always tried to do what was reasonable, and prevent by special orders the injustice that would otherwise have been done, though they were sometimes hindered in this by technical difficulties. The effect of s. 174 of the Common Law Procedure Act, 1852, is to alter the rule; for it does just what used to be done by judge's order, and enables the defendant to limit his defence, and the effect of it must be at least to give the master a discretion as to the costs he will allow against the defendant who so limits his defence. It would seem that separate judgments might be signed against the different defendants in respect of the portions of land for which they defend, and the form

(1) Barnes's Notes, 149.

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of judgment (No. 20) given in the schedule A. of the act bears this out, and even if not, it has not been shewn that there can be only one allocatur.

Cur. adv. vult.

Nov. 25. The judgment of the Court (Bovill, C.J., Willes, Byles, and Keating, JJ.), was delivered by

BOVILL, C.J. This was an application that the master should be at liberty to review his taxation made at the instance of one of several defendants in an action of ejectment, the object of the motion being to relieve the applicant from a portion of the costs which related to, and were incurred by reason of, other defendants having been joined in the action. The Court took time to consider the proper construction to be placed on the act of parliament, and the practice that ought to prevail in such cases, and they see no ground for a review of the taxation in this case.

By the Common Law Procedure Act, 1852, s. 174, a person who is sued in ejectment, is at liberty to defend for a portion of the property only, and is expressly authorized to limit his defence to the part for which he so defends. By another section of the same act, s. 205, it is competent to one of several defendants, after he has appeared to defend for part, to confess the title of the plaintiff as to the part for which he has appeared. In that case he may relieve himself from the general costs of the cause, and remains liable to the costs incurred by his defence in respect of the part for which he had appeared. The applicant in this case, being sued with others in ejectment, appeared to defend in respect of a part of the premises claimed by the plaintiffs under the 174th section, but he did not take advantage of the provisions of s. 205 by confessing the plaintiffs' title. He gave a notice, not in the terms of that section, but an informal notice so far as costs are concerned, that he did not intend to appear. The plaintiffs were, therefore, bound to go down to trial; the applicant was still a defendant on the record, and was one of those against whom the plaintiffs were bound to establish their right. In that state of things, the applicant was a co-defendant with the others and defending with them, and, the defence failing, would be liable equally with them to the general costs of the cause. The plaintiffs having succeeded, and obtained a general verdict

against all the defendants, no question was raised on the argument of this rule, as to the liability of the applicant to contribute jointly with the others, to the costs that had been properly incurred as the general costs in the cause. It was objected, however, that he was not liable in respect of portions of the costs that were incurred by reason of other persons being made co-defendants with him. The general rule undoubtedly is, that all the defendants in ejectment are liable for the whole of the costs incurred by the plaintiff, where he succeeds. And there would be great difficulty in ascertaining and determining accurately which portion of the costs would be applicable to one, and which portion of the costs would be applicable to another defendant, and still greater difficulty in apportioning each particular charge as against each particular defendant; probably on the ground of convenience, therefore, it has been adopted as a rule that in such cases each defendant is liable for the whole of the costs which have been incurred. There may be cases in which this rule will operate with manifest hardship and injustice. It is sufficient to say, that if any case of manifest hardship and injustice should arise, the Court has ample power to deal with such case, and to apportion the costs in a manner which might seem just. One instance would be where an ejectment is brought for two properties depending on two separate titles. Without saying what course the Court would ultimately adopt until all the circumstances are brought to its attention distinctly, it is sufficient for us upon the present occasion to say that we do not find any case of oppression or injustice made out here. The Court has a general jurisdiction over the action of ejectment reserved to it by s. 251 of the Common Law Procedure Act, 1852, and would not be slow to exercise it in a case where it was made out that justice required the interference of the Court. The ejectment here was brought for the recovery of the whole of a property depending on one title. Any person having an interest might appear or not as he thought fit. After he had appeared he had power to relieve himself from any general costs in the cause, and in that case would be liable only for the costs occasioned by his particular defence. There seems to have been no abuse of proceeding of the Court, or any impropriety that should induce us to depart from the general rule. The defendant had the opportunity of relieving himself of all costs by confessing the claimants'

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title; he did not think fit to do so; and having failed in that respect he must take the consequences, and, according to the general rule, be liable to the costs, on the principle on which they have been taxed. The rule, therefore, will be discharged.

Rule discharged.

Attorneys for plaintiffs: *Drew & Wilkinson.*
Attorneys for defendant Foot: *Hunter, Geratkin, & Hunter.*

Nov. 30.

WOOD AND ANOTHER *v.* RILEY.

County Courts Act, 1867 (30 & 31 *Vict. c.* 142), *s.* 5—*Costs.*

The 5th section of the County Courts Act, 1867 (30 & 31 Vict. c. 142), provides "if in any action commenced after the passing of this act in any of her Majesty's superior courts of record, the plaintiff shall recover a sum not exceeding 20*l.* if the action is founded on contract . . . . he shall not be entitled to any costs of suit . . . . unless the Court or a judge at chambers shall, by rule or order, allow such costs."

By the 36th section of the act, it is provided "this act shall come into operation on the first day of January next after the passing thereof."

The act was passed on the 20th day of August, 1867:—

Held, that the 5th section does not come into force till after the first day of January, 1868.

THIS was a rule to shew cause why the plaintiffs should not be allowed their costs to be taxed by one of the masters of the Court.

The writ was issued on the 13th day of October last, and was indorsed with the usual indorsement that in default of appearance, and judgment being signed, application would be made for an order for costs, if no notice was given by defendant of opposing the same. Judgment was signed in default of appearance for 10*l.* 10*s.*, and an application made for an order for costs. No notice had been given by the defendant of his intention to oppose the plaintiffs' application for costs, but the order was refused that the question might be raised whether the 5th section of the County Courts Act, 1867 (30 & 31 Vict. c. 142), was in force, and whether, therefore, such an order was requisite. (1)

(1) 30 & 31 Vict. c. 142, s. 5. "If in any action commenced after the passing of this act in any of her Majesty's superior courts of record, the plaintiff

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Biron shewed cause. The question turns entirely on whether the 5th section of the County Courts Act, 1867 (30 & 31 Vict. c. 142), which deprives a plaintiff of his costs when the sum recovered is under 20*l.*, unless he obtains a judge's order, is yet in force. The act received the royal assent on the 20th of August, 1867, and though the rest of the act does not come into force till the 1st of January, 1868, it was intended that this section should come into force immediately on the passing of the act. The phraseology is distinct from that used in the other sections, and though the last section gives a general date when the act is to take effect, and so prevents the operation of 33 Geo. 3, c. 13, which provides that acts of parliament shall come into force on receiving the royal assent, unless it is otherwise provided; still this section applies at once to all actions commenced after the passing of the act. The plaintiffs, therefore, not having obtained an order, are not entitled to their costs.

Day, in support of the rule, was not called on.

BOVILL, C.J. The last section of the act, which is in the usual form, prevents the act having any operation till after the 1st of January, 1868. The sections are all framed as if it would come into operation at once, because the last thing settled is when it shall come into operation, but they are all to be considered as speaking from the date so fixed, and are all governed by the last section.

KEATING, J. I am of the same opinion. If the two sections are repugnant, the known rule is that the last must prevail.

Rule absolute.

Attorneys for plaintiffs: *Dubois & Maynard.*
Attorney for defendant: *G. Cheatle.*

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shall recover a sum not exceeding 20*l.* if the action is founded on contract, or 10*l.* if founded on tort, whether by verdict, judgment by default, or on demurrer, or otherwise, he shall not be entitled to any costs of suit unless the judge certify on the record that there was sufficient reason for bringing such action in such superior court, or unless the Court or a judge at chambers shall, by rule or order, allow such costs."

s. 36. "This act shall come into operation on the first day of January next after the passing hereof."

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Nov. 19.

[REGISTRATION CASE.]

BENNETT, Appellant; BRUMFITT, Respondent.

Parliament—Borough Vote—Notice of Objection—Signature of Objector—Stamp—6 Vict. c. 18, *s.* 17.

An objector affixed his name to the notice of objection by means of a stamp on which was engraved a fac-simile of his ordinary signature:—

Held, that the notice was "signed by the person objecting," within the 17th section of the 6 Vict. c. 18.

Appeal from the decision of the revising barrister for the borough of Liverpool.

1. William Brumfitt objected to the name of Frederick Caple being retained on the list of voters for the borough.

2. It was contended, on behalf of the appellant, that the notice of objection was not signed by William Brumfitt.

3. By the 17th section of the 6 Vict. c. 18, it is enacted "that the notice of objection shall be signed by the person objecting."

4. The usual signature of William Brumfitt was engraved in fac-simile; and William Brumfitt himself, by his own hand, impressed his stamp upon the notice of objection.

5. The revising barrister found that the notice of objection was signed by the person objecting, as required by the above section of the statute; and Frederick Caple not appearing, in answer to the objection, to prove his title to vote, his name was erased from the list of voters.

The question for the opinion of the Court was whether the notice of objection was signed by the person objecting, as required by the statute. If the Court should be of opinion that the notice of objection was not so signed, the name of Frederick Caple was to be reinstated on the list of voters.

Charley, for the appellant. The notice of objection was not signed in the manner required by the statute. Where a statute requires the signature of the party himself, a signing by an agent will not do; as under the 9 Geo. 4, c. 14, s. 1: *Hyde* v. *Johnson*. (1) Lord Coke, in his exposition upon the Statute of Inrolments,

(1) 2 Bing. N. C. 776; 3 Scott, 289.

27 Hen. 8, c. 16 (1), commenting upon the words "except the same bargain and sale be made by writing," says: "First, it must be by writing, and not by print or stamp; secondly, it must be written in parchment or paper, and not upon wood, stone, lead, or other materiall." The *writing* here is the act of the engraver, not that of the objector. In Webster's Dictionary, signature is defined as "the name of a person written or subscribed by himself."

[BYLES, J. If the objector was unable to write, would it be sufficient if he affixed his mark?]

It has never been held that a mark will suffice where an act of parliament requires the "signature" of the party. (2) In *Toms* v. *Cuming* (3), where it was held that the duplicate as well as the notice sent by post must be personally signed by the objector, all the judges concur in holding that "signature" means the actual signing of the document by the party himself. This was confirmed in *Lewis* v. *Roberts* (4), and *Trotter* v. *Walker*. (5) In *Brumfitt* v. *Bremner* (6), Byles, J., says: "The word 'sign' occurs for the first time in s. 41 (6 Vict. c. 18), with regard to the signature of the lists by the revising barrister, which is referred to by the words 'signed as aforesaid' at the beginning of s. 47. The word occurs again at the end of s. 47, where it is provided that the clerk of the peace shall 'sign' and deliver the book to the sheriff. Again it occurs at the beginning of s. 49, where it is enacted that the book 'so signed as aforesaid' and delivered by the clerk of the peace to the sheriff, shall be the register of persons entitled to vote. Comparing all these, it seems to me that the word 'sign' in the 47th section, as in the 41st, means a signature in the ordinary sense, *by the hand of the party*." To hold that stamping is sufficient would go far to defeat the policy of the act, which was to

(1) 2 Inst. 272.

(2) In Todd's Johnson's Dictionary, it is said "to sign, as, to sign a writing, is an expression drawn from the practice of our ancestors, the Anglo-Saxons, who, in attesting their charters, prefixed the sign of the cross to their names. Hence it comes to pass, that, when a person that cannot write is to make his mark, he usually makes a cross. And I apprehend that such Saxons as could not write made their crosses, and the scribe wrote their names." Pegge, Anonym. iii. 42.

(3) 8 Scott N. R. 910; 7 Man. & G. 88; 1 Lutw. 200.

(4) 11 C. B. (N.S.) 23; K. & G. 402.

(5) 13 C. B. (N.S.) 30; K. & G. 534.

(6) 9 C. B. (N.S.) 1, 15; K. & G. 352.

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prevent the voter from being harassed by vexatious objections, and to give him a facile remedy for costs against a frivolous objector: per Tindal, C.J., in *Toms* v. *Cuming*. (1) Three ways of proving a signature are adverted to in Taylor on Evidence, 4th ed. p. 1555, s. 1660, viz. by calling the writer himself, by calling some person who actually saw the signature written, or by the testimony of persons acquainted with the handwriting. In the latter case, it was necessary formerly that the witness should have seen the party write; comparison of hands by a person who never saw him write was not evidence: *Eagleton* v. *Kingston*. (2) Suppose the objector in a case like this to deny his signature, how is it to be proved? The stamp might have been used by some one else; and, if the party himself could not swear that the impression on the particular document was made by him, how could any one else prove it?

[BYLES, J. An indorsement upon a promissory note written with a pencil is a valid indorsement: *Geary* v *Physic*. (3)]

The objections which exist as to stamping would not apply there. The statute of frauds will be satisfied, no doubt, by the name being printed: *Saunderson* v. *Jackson* (4); *Schneider* v. *Norris*. (5)

[BYLES, J. A mark has been held to be a sufficient signing of a will, within the 29 Car. 2, c. 3, ss. 5, 6: *Baker* v. *Dening*. (6) Under s. 17 of the same statute, printing by the hand of another is held sufficient. Here, the signature is printed by the objector himself.]

Crompton, for the respondent, was not called upon.

BOVILL, C.J. The question in this case is whether the notice of objection was "signed by the person objecting," within the meaning of the 17th section of the 6 Vict. c. 18. The name of the objector was affixed to the notice by himself by means of a stamp upon which was engraved his ordinary signature. I am of opinion that that was a perfectly good signature within this statute. It is clear that it would be a good signature within the statute of frauds.

(1) 8 Scott N. R. at p. 916; 7 Man. & G. 92; 1 Lutw. 204.
(2) 8 Ves. at pp. 473, 474.
(3) 5 B. & C. 234.
(4) 2 B. & P. 238.
(5) 2 M. & S. 286.
(6) 8 Ad. & E. 94.

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It is equally clear that it would have been a good signature to a will. The decision of the revising barrister was therefore in my judgment perfectly correct. The ordinary mode of affixing a signature to a document is not by the hand alone, but by the hand coupled with some instrument, such as a pen or a pencil. I see no distinction between using a pen or a pencil and using a stamp, where the impression is put upon the paper by the proper hand of the party signing. In each case it is the personal act of the party, and to all intents and purposes a signing of the document by him. If the objector here had used a pencil or a paint-brush, it would hardly have been contended that he had not signed the notice. I think the requirement of the statute has been sufficiently complied with.

WILLES, J. I am entirely of the same opinion. The using a stamp is only a compendious way of writing the party's name. Acts of parliament have been passed for the purpose of removing doubts in reference to certain important signatures. Personal signature was only considered necessary in the case of the royal sign manual, which is said to be distinguished from every ordinary signature. This led to a special act of parliament in the reign of Geo. 4 (1) to enable his Majesty, who was labouring under severe indisposition which rendered it painful and inconvenient for him to sign with his own hand instruments which required the royal sign manual, to appoint certain persons to affix it by means of a stamp. A special legislative provision also was made for the signature of bank-notes. For the reasons given by my Lord, I think the mode adopted in this case is a sufficient compliance with the 17th section of the 6 Vict. c. 18.

BYLES, J. I am of the same opinion. It is plain that this would be a sufficient signature within the 17th section of the statute of frauds: and much less would be held sufficient under the statute of wills. A mere cross, properly attested, has been held to suffice in the case of a will; and that whether the testator could write or not. In *Baker* v. *Dening* (2), the Lord Chief Justice Denman and Littledale, J., refused to allow an inquiry as to whether or not the party

(1) 11 Geo. 4 & 1 Wm. 4, c. 23. (2) 8 Ad. & E. 94.

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could write to be gone into, as being dangerous. One has heard of people born with neither hands nor feet. How would such a person sign a notice of objection?

KEATING, J. I am of the same opinion. I see no reason why a different construction should be put upon signing under this statute from that which it has received under the statute of frauds and the statute of wills. Patteson, J., in *Lobb* v. *Stanley* (1), says that the object of all the statutes is merely to authenticate the genuineness of the document. I am at a loss to see how the genuineness of a notice of objection is better authenticated by a signature by means of a pen than by means of an impression of a stamp affixed by the party's own hand.

Decision affirmed, with costs.

Attorney for appellant: *H. H. Poole, for W. Pierce, Liverpool.*
Attorneys for respondent: *Field & Co., for F. Archer, Liverpool.*

Nov. 29.

[IN THE EXCHEQUER CHAMBER.]

ROPER *v.* ROPER AND OTHERS.

Devise, Construction of—Estate-Tail—Child in ventre sa Mère.

SCh 370

Testator devised as follows:—"I give and bequeath unto my dear wife, M. P., all my estate of land, situate, &c., for her natural life; and, after her decease, I give and bequeath the same unto my daughter, M., wife of A. R., *to her and her children for ever.*" At the date of the will and of the death of the testator, the daughter M. was enceinte of a daughter, who was born after the testator's death. She had afterwards other children, who survived:—

Held,—affirming the decision of the Court of Common Pleas,—that the testator's daughter, M., took an estate-tail.

EJECTMENT for a messuage and appurtenances in Frog Street, in the parish of St. Edmunds, in the city of Exeter. The following case was stated for the opinion of the Court of Common Pleas:—

1. Henry Pretty, of St. Edmunds, Exeter, being at the time of making his will hereinafter set forth, and thenceforth to and at the time of his decease, seised in fee-simple in possession of certain

(1) 5 Q. B. 574.

freehold land in Frog Street, Exeter, of which the premises in respect of which this action is brought were part, by his last will and testament in writing, dated the 1st of August, 1806, duly executed and attested for passing freehold estate, gave and devised the same as follows:—"I give and bequeath unto my dear wife, Mary Pretty, all my estate of land situate in Frog Street, &c., for her natural life; and, after her decease, I give and bequeath the same unto my daughter Mary, wife of Alexander Roper, to her and her children for ever." And by the said will the testator appointed his said wife Mary sole executrix thereof.

2. Henry Pretty died in 1806, without having altered or revoked his said will; and the same was duly proved by his widow, Mary Pretty, in the Archdeaconry Court of Exeter, on the 12th of November, 1806.

3. At the time of the making of the will, and of the death of Henry Pretty respectively, Mary Roper was enceinte of a daughter who was afterwards born on the 14th of January, 1807, and died on the 13th of January, 1808.

4. The plaintiff is the eldest son of Mary Roper, and was born on the 8th of April, 1808.

5. Mary Pretty died on the 29th of October, 1843.

6. Mary Roper died on the 27th of May, 1866, and by her will, dated the 14th of June, 1865, and which was duly proved in the Archdeaconry Court of Exeter, gave and devised the premises in the said will described, as follows:—"I give and devise to my son, Alexander Braddon Roper (defendant), his heirs and assigns for ever, the front dwelling house, situate in Frog Street," &c. &c.

7. Mary Roper never at any time executed any disentailing assurance.

8. The plaintiff claimed, as eldest son of Mary Roper, to be entitled to the premises upon her death, as tenant in tail under the will of Henry Pretty.

9. The defendant claimed as devisee under the will of Mary Roper.

The question for the opinion of the Court was, whether, under the will of Henry Pretty, Mary Roper took an estate-tail in the property thereby devised.

The Court of Common Pleas held that the special form of words used by the testator, "unto my daughter Mary, wife of

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Alexander Roper, *to her* and her children for ever," sufficiently shewed his intention that Mary Roper should take an estate-tail; as the words "to her" would be surplusage if the words "and her children" were words of purchase and not of limitation, and the Court was bound to give a meaning, if possible, to all the words in the will, and they gave judgment accordingly for the plaintiff. Upon this decision the defendants brought error.

Nov. 28. *Shapter, Q.C.*, for the defendants, contended that under the devise in question, Mary Roper and her unborn child took as tenants in common; and, if not, that she took an estate for life, with remainder to her children, as tenants in common in fee. He referred to *Wild's Case* (1), *Oates* d. *Hatterley* v. *Jackson* (2), *Davie* v. *Stevens* (3), *Doe* v. *Clark* (4), *Trower* v. *Butts* (5), *Blasson* v. *Blasson* (6), *Grieve* v. *Grieve* (7), *Byng* v. *Byng* (8), and *Tyrone* (*Earl*) v. *Waterford* (*Marquis*). (9)

Joshua Williams, Q. C. (*Holl* with him), contrà, contended that Mary Roper took an estate-tail, and consequently that, upon her death, the plaintiff, as her eldest son, was entitled to the property. He commented upon and distinguished the cases cited on behalf of the defendant, and referred to *Doe* d. *Gigg* v. *Bradley* (10), *Broadhurst* v. *Morris* (11), *Webb* v. *Byng* (12), and *Mason* v. *Clarke*. (13)

Shapter, Q. C., was heard in reply.

Cur. adv. vult.

Nov. 29. The judgment of the Court (Kelly, C. B., Bramwell and Channell, BB., and Mellor, Shee, and Lush, JJ.) was delivered by

KELLY, C. B. The question in this case is whether Mary Roper, the daughter of the testator, took an estate-tail under a devise in the following words:—"I give and bequeath unto my dear wife, Mary Pretty, all my estate of land situate in Frog Street, in the parish aforesaid, for her natural life; and, after her decease, I

(1) 6 Co. Rep. 17.
(2) 2 Str. 1172.
(3) 1 Doug. 321.
(4) 2 H. Bl. 399.
(5) 1 Sim. & St. 181.
(6) 2 De G. J. & S. 665.
(7) Law Rep. 4 Eq. 180.
(8) 10 H. L. C. 171.
(9) 29 L. J. (Ch.) 486.
(10) 16 East, 399.
(11) 2 B. & Ad. 1.
(12) 2 Kay & J. 669.
(13) 17 Beav. 126.

give and bequeath the same unto my daughter Mary, wife of Alexander Roper, to her and her children for ever."

In the construction of wills, certain words and phrases have acquired, upon the authority of many decisions, a fixed and definite meaning which courts of law are now bound to ascribe to them, although the effect may sometimes be to defeat the real and actual intentions of the testator; and, if the words of this will had devised the estate in question to "Mary Roper and her children," and she had had two or more children in existence at the date of the will, we might have been compelled to hold that they gave a joint-tenancy to the mother and her children, and not an estate-tail to the mother; but, looking to the precise words which we find in this will, we are of opinion that, consistently with all the authorities to which we have been referred upon the argument at the bar, they must be construed to give an estate-tail to Mary Roper.

The rule of construction, now commonly called the rule in *Wild's Case* (1), is to this effect :—"Where lands are devised to a person and his children, and he has no child at the time of the devise, the parent takes an estate-tail, for, it is said, the intent of the devisor is manifest and certain that the children, or issue, should take, and as immediate devisees they cannot take, because they are not in rerum natura; and by way of remainder they cannot take, for that was not his (the devisor's) intent, for the gift is immediate, and therefore such words shall be taken as words of limitation."

In this case, Mary Roper had no children in existence at the date of the will (1st of August, 1806), or after the testator's death (in November, 1806). It is true that she had a child born on the 14th of January, 1807, which child must therefore have been en ventre sa mère at both the preceding periods; but it seems impossible to suppose that the testator can really and in fact have treated this unborn child as the immediate object of the devise jointly with the mother; and, were it otherwise, one child would be insufficient to satisfy the word "children," in the plural, and consequently the words used appear to come strictly within the principle of *Wild's Case*. (1) The devise being "to my daughter Mary Roper, to her

(1) 6 Co. Rep. 17; S. C. *Anon.* *Richardson* v. *Yardley*, Moore, 397, pl. Gouldsb. 139, pl. 47; S. C. nom. 519.

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and her children for ever," also excludes the construction that an immediate gift to the mother and one child, as joint-tenants, could have been intended.

We likewise adopt the view of this case upon which it has been decided by the Court of Common Pleas, viz. that the form of the sentence "unto my daughter Mary, wife of Alexander Roper, to her and her children for ever," clearly shews that the children were to take through the mother, and that the words "and her children" are words of limitation, and not of purchase, and consequently that an estate-tail was created.

Upon these grounds, we think that the plaintiff was entitled to recover, and that the judgment of the Court of Common Pleas must be affirmed.

Judgment affirmed.

Attorney for plaintiff: *J. Yarde, for W. Huggins, Exeter.*
Attorney for defendants: *W. Moon, for Bishop & Son, Exeter.*

Nov. 6.

DUNHILL *v.* FORD.

Costs—Arbitration.

A cause and all matters in difference were referred by an order at Nisi Prius, which provided that the costs of the reference and award should abide the event of the award. The arbitrator decided the cause in favour of the defendant, and with respect to the matters in difference, awarded that the plaintiff had a valid claim against the defendant, and that the defendant had a valid claim against the plaintiff of larger amount, and directed the plaintiff to pay the difference to the defendant. The claims were unliquidated, and could not have been set off against one another in an action:—

Held, that the event of the award was wholly in the defendant's favour, and the defendant therefore entitled to the costs of the reference and award.

THIS was a motion for a rule to review the master's taxation.

The cause and all matters in difference had been referred at the trial to arbitration, and by the order of reference it was provided that the costs of the cause should abide the event of the action, and that the costs of the reference and award should abide the event of the award. The arbitrator decided the action in favour of the defendant, and with respect to the other matters in difference,

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awarded that the plaintiff had a valid claim for 12*l.* against the defendant, and the defendant a valid claim for 55*l.* 2*s.* 10*d.* against the plaintiff, and directed the plaintiff to pay to the defendant the sum of 43*l.* 2*s.* 10*d.*, being the difference. The claims were unliquidated, and could not have been set off against one another in an action. The master taxed the costs of the action, and also of the reference and award for the defendant.

Brown, Q.C., for the plaintiff. The defendant is not entitled to the costs of the reference and award. The rule where costs are to abide the event of an award is that, if the award is partly in favour of one party and partly of the other, each party pays his own costs. *Boodle* v. *Davies.* (1)

[BOVILL, C.J. Is not the event here entirely in favour of the defendant?]

No. Some of the plaintiff's claims have been found in his favour, and though other claims have been found in favour of the defendant, they were not of such a nature that they could have been set off against those found in favour of the plaintiff.

[WILLES, J. The effect of the award is to set them off and to merge the plaintiff's claim in that of the defendant.]

BOVILL, C.J. It seems to me impossible to say that the event of this award is not in favour of the defendant. I can find no event in favour of the plaintiff.

WILLES, BYLES, and KEATING, JJ., concurred.

Rule refused.

Attorneys for plaintiff: *Linklater & Co.*

(1) 3 A. & E. 200.

1867 JOHNSON AND ANOTHER *v.* ROYAL MAIL STEAM PACKET COMPANY.

Nov. 25.

Ship and Shipping—Mortgage—Trover—Delivery of Goods—Maritime Lien—Money paid—Privity of Contract—Compulsory Payment of the Debt of Another.

66 354
5 P.D. 175

A. being the owner of a steamship mortgaged it to B., and subsequently, under circumstances held to shew acquiescence by B., entered into an agreement in contemplation of a partnership with C., by the terms of which C. was to work the ship for A. till further notice, paying all the expenses and receiving all the profits, A. agreeing to indemnify him against loss, if any, upon a periodical statement of accounts. Subsequently to this agreement B. gave notice to C. of the mortgage, and required possession of the ship. The ship was being employed in voyages at a distance from England, between S. and T., and was at that time at S., under engagements which had been entered into by C. with third parties, with respect to its next voyage to T. The ship was given up to B.'s agent at T. at the termination of its next voyage thither. At the time of such delivery C. owed to the crew of the ship a large sum for wages, which entitled them to proceed against the ship in the Admiralty Court; and shortly after the delivery of the ship the crew took such proceedings, and the ship was seized by the officers of the Court. B., after suffering much delay and loss, paid the wages and obtained possession of the ship. In an action of trover for the ship, and for money paid, brought by B. against C.:—

Held, that C. was entitled to retain possession of the ship till its arrival at T., in order to fulfil the engagements incurred before notice.

Held, also, that as there had been a delivery of the ship at T., notwithstanding it was subject to a maritime lien for wages, A. was not entitled to recover on the count for trover.

Held, also, that B. was entitled to recover the wages from C. under the count for money paid.

DECLARATION in trover for two ships and for money paid. Pleas: Not guilty, and never indebted. There were other pleadings, which gave rise only to questions of fact.

The action was tried before Erle, C.J., at the sittings in London after Michaelmas Term, 1864, and was then turned into a special case, and the facts therein stated, as far as related to the present questions, were as follows:—The European and Australian Royal Mail Company, Limited, were the owners of two steam-vessels, which they mortgaged in November, 1857, to the plaintiffs. In the month of April, 1858, the European and Australian Royal Mail Company, under circumstances held to shew acquiescence by the mortgagees, entered into an agreement with the defendants, under the terms of which the defendants were to work the steamers,

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with a view to amalgamation, until further notice, paying all expenses, and receiving all the profits, the European and Australian Royal Mail Company indemnifying them for the loss they might sustain thereby, if any, upon a periodical statement of accounts. The defendants at that time had no notice of the mortgage. In the beginning of July, 1858, the plaintiffs gave the defendants notice of their mortgage, and required them to deliver up the vessels to their agent at Sydney. The vessels were then running between Suez and Sydney, and were at that time at Suez preparing to start for Sydney, and the defendants had, at that time, entered into engagements with third parties for the coming voyages, so that they had an interest in using them which would have entitled them to do so, in spite of any notice which they might have received from the European and Australian Royal Mail Company, terminating the agreement. In accordance with the notice from the plaintiffs, the defendants delivered up the vessels to their agent at Sydney on their arrival there; but at the time of such delivery a sum of more than 5000*l.* was due from the defendants to the officers and crews of the vessels for their wages, for which the latter were entitled to a maritime lien upon the vessel.

The officers and crews took proceedings in the Vice Admiralty Court at Sydney, and shortly after the vessels had been delivered up to the plaintiffs they were seized by the officers of that Court, and a difficulty arising with respect to the payment of the money, partly owing to the want of a properly authorized agent of the plaintiffs there, they were detained some months. Ultimately the plaintiffs paid the sum claimed and obtained possession of the ships, which were then sold, but realized less than the amount for which they were mortgaged.

The plaintiffs claimed a sum for the use and occupation of the ships from the time of notice till the delivery up of the ships at Sydney; the repayment of the wages which had been paid by the plaintiffs; and damages for the detention of the ship, on the ground that the delivery of the ship, subject to the lien for wages, was not a sufficient delivery of it in law.

Nov. 18. *Horace Lloyd* (*Maude* with him), for the plaintiffs. From the time of the notice given by the plaintiffs to the defendants in

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July, 1858, the ships were really their property, and though the use of them by the defendants was not wrongful, it having been clearly the intention of both parties that the vessels should be given up at Sydney, they are entitled to compensation for their use by the defendants during the intervening time. The defendants did not really deliver up the vessels to the plaintiffs on their arrival at Sydney, as it is admitted they were bound to do, for they were bound to give the plaintiffs the complete control over them, and as long as they were subject to a maritime lien which rendered them liable to seizure, the plaintiffs had not such control.

They are, at any rate, entitled to be repaid the wages, which were a debt which had been incurred by the defendants, who had received the freight and other profits which had been earned by the services of the crew. The defendants were bound to give the vessels up to the plaintiffs free from all such charges, and they not having done so, the plaintiffs were compelled to pay the amount to obtain possession of the vessels, and are therefore entitled to recover it from them.

Mellish, Q.C. (*Bushby* with him), for the defendants. The plaintiffs have no claim to any payment for the use of the ships till their arrival at Sydney. A mortgagee is not entitled to the profits of the property mortgaged until he enters into possession of it, and it is admitted that both parties intended that possession of the ships should be taken by the plaintiffs at Sydney, and not before. The question whether the delivery at Sydney was a sufficient delivery of possession is exceptional, for actual possession of the ships was, it is admitted, given to the defendants, which in itself would be inconsistent with the existence of any other than a maritime lien. If the ships had been seized by the Admiralty Court before being given up to the plaintiffs, the case might have been different, as it might then have been said that the plaintiffs never had possession of them; but, in fact, they had complete possession of them till the seizure, and that might not have taken place till long after, and yet the principle of the case would have been the same. It is admitted that it is a question of tort, and not of contract. And what is the tort complained of? The incurring the debt for wages was not a tort, and the defendants have not converted the ship to their own use, or in any way kept the plaintiffs

out of possession of it, or hindered them in the enjoyment of it. The seizure of the ships was in no sense the act of the defendants.

The plaintiffs are not entitled either to recover under the count for money paid the wages which they have paid, for there is no privity of contract between them and the defendants. The mortgagee has, no doubt, a right to have the property given up to him free of all charges, but that is a right as against the mortgagor, and the plaintiffs can recover this sum from the European and Australian Royal Mail Company. The money, therefore, was paid to their use, and cannot have been paid to the use of the defendants also. It is not denied that the defendants would be liable for this amount to the European and Australian Royal Mail Company, against whom, however, they have a set-off of far larger amount, and this has been, in fact, already decided in the previous case of *European and Australian Royal Mail Company, Limited*, v. *Royal Mail Steam Packet Company* (1); but that is itself a proof that they are not also liable to the present plaintiffs, or else the defendants may have to pay the same debt twice.

Horace Lloyd, in reply. When it is said that the plaintiffs had possession of the ships, it is giving a special meaning to the word "possession." They had only a possession subject to the rights of third parties, which could be at any time enforced. It is admitted that there would have been no delivery, if at the time when the defendants gave up the vessel the officer of the court had been actually in possession, and he was potentially in possession, and there cannot be any real difference between the two. *Cur. adv. vult.*

Nov. 25. The judgment of the Court (Willes, Byles, and Keating, JJ.) was delivered by

WILLES, J., who, after stating the facts, and that as they were the same with respect to the two vessels he need speak only of one, and after giving judgment on the other questions in the case, proceeded:—It is necessary now to consider what rights the mortgagees have established themselves to possess by reason of their ownership or quasi ownership of the vessel. In our opinion, the mortgagees were equally bound with the mortgagors in respect of the engagements that had been entered into between the

(1) 30 L. J. (C.P.) 247. 8 Jur. N.S. 136

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mortgagors and the Royal Mail Company before they interposed. Without entering into the question of mortgages of land further than to say that we have given it our consideration—the case of a mortgagee and mortgagor of a ship appears to be one of quite a different complexion, because the mortgagee, so long as he does not interfere and claim the possession, may fairly be taken to have allowed the mortgagor to enter into all engagements for the employment of the ship of the sort usually entered into by a person who has the apparent control and ownership of a vessel. Looking at the circumstances of this case, we think that the notice of July, claiming a delivery of the vessel at Sydney, sufficiently expresses the rights which the plaintiffs had against the vessel and the defendants, and that the right to treat the defendants as wrongdoers for continuing the use of the vessel after the receipt of the notice was no larger than that of the mortgagors would have been. With respect to the contract which it was suggested might have been implied between the plaintiffs and defendants, from the fact that on the receipt of the notice the defendants might have stopped the vessel at Suez, but did not do so, but used her for the voyage from Suez to Sydney, it follows, obviously, from what we have said, that if any contract could be implied, it could only be a contract to deliver up the vessel after using her to the extent and in the manner provided for by the agreement between the European and Australian Mail Company and the defendants. Such a contract would be in accordance with the view we take of the relation of the mortgagees and the Royal Mail Company as to another item. I may add, however, that it is not essential to the judgment which we have to pronounce on the other parts of the claim.

I will proceed to consider the claims in respect of the subsequent payments made by the plaintiffs, and the expenses incurred by reason of their having had to make those payments.

The Royal Mail Company, we must take it, received, as they had a right to receive under the agreement, the earnings of the voyage, or, perhaps, to speak more accurately, they received what was paid in respect of freight upon the voyage from government, from passengers, and in respect of cargo; whether the voyage was favourable or not, in a pecuniary point of view, is immaterial, and although freight cannot be said now, in so

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strict a sense as formerly, to be the mother of wages, yet it would follow, as a matter of business, according to ordinary practice, that they ought thereout to have discharged the wages of the crew of the vessel. Those wages were incurred during the period of their possession and control, and the crew were employed by them. Theirs were the hands which received what was paid for freight, and theirs were the hands which ought to have paid the men by whose labour that freight was earned. Moreover, it was expressly provided by the agreement between the European and Australian Mail Company and the defendants that the latter should pay the working expenses in the first instance. Wages, of course, ought to be paid speedily, and in respect of that obvious piece of justice a remedy is given, whereby the seamen are authorized to have the vessel detained by the process of the Admiralty in order to satisfy their claims. Now, these wages were left unpaid, the vessel was seized in the Admiralty Court, the money was not ready on the spot, various causes, partly resting with the plaintiffs, led to very great delay, but in the result the mortgagees did pay the wages, and the vessel was released, and this gives rise to the second claim.

Now the mortgagees having had to pay sums of money for which the Royal Mail Company were liable in the first instance, which they ought, according to Maritime usage, and by their contract with the European and Australian Company, to have forthwith paid; what answer is set up by the Royal Mail Company against reimbursing the mortgagees who have paid their debt? Of course there is, upon the surface, that by the law of this country, differing, it is said, in that respect from the civil law, nobody can make himself the creditor of another by paying that other's debt against his will or without his consent; that is expressed by the common formula of the count for money paid for the defendant's use, *at his request*. That is the general rule, undoubtedly, but it is subject to this modification, that money paid to discharge the debt of another cannot be recovered unless it was paid at his request, *or under compulsion*, or *in respect of a liability imposed upon that other*. This is the modification of the rule relied upon by the plaintiff, and the question is, within which branch of the rule the present case falls?

It was argued on the part of the defendants that the non-pay-

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ment of the wages was a breach of contract only, and it was said the European and Australian Company may recover, because they have an agreement with the Royal Mail Company by which they have stipulated that the latter should pay those wages, so let them sue. They have, moreover, sued, and this Court has held that the action was maintainable, and it was held, if one may use such an expression, in terrorem over the Court, that if we decided that the mortgagees should recover in this action for the wages that they paid, the European and Australian Company may also recover in their action, and so that the same sum of money would be recovered by two different persons against the same defendants in respect of the same matter, which would be absurd. That difficulty, however, is not a practical one, because if the defendants pay the plaintiffs the European and Australian Company could only recover nominal damages in respect of the breach of that contract; they did not pay the wages in question; those were paid by the mortgagees, paid out of their moneys, and not out of the moneys of the European and Australian Company. It would be, therefore, a matter of nominal damages, simply founded upon the breach of contract, and by reason of the technical rule that any breach of contract, although not the cause of any damage, gives rise to a claim for nominal damages. But then it is said if you get rid of that, how do you dispose of the objection that there is no contract between the mortgagees and the Royal Mail Company? The answer was this, on the part of the plaintiffs, that the contract is not set up by them as mortgagees to enforce any claim thereupon, the contract is set up by the defendants, the Royal Mail Company, for the purpose of justifying their detention of the vessel as against the mortgagees; and if they can justify the sailing of the vessel from Suez to Sydney, as against the mortgagees, by reason of their having a bailment which gave them an interest, and in respect of that interest and their being entitled to sail her upon that voyage, it seems that it would be blowing hot and cold that they should be allowed to give up the vessel upon other terms than those of the contract which has justified the course which they have taken. Moreover, the compulsion of law which entitles a person, paying the debt of another, to recover against that other as for money paid, is not such a compulsion of law as would avoid a contract,

like imprisonment. It has been decided in numerous cases that restraint of goods by reason of the non-payment of the debt due by one to another is sufficient compulsion of the law to entitle a person who has paid the debt in order to relieve his goods from such restraint to sustain a claim for money paid. This is a case which we have been compelled to consider very much upon its own circumstances, which are very peculiar, and may be difficult to be made a precedent, perhaps, in any future case. Perhaps the nearest case that could be put by way of illustration would be this. A. lends B. his horse for a limited period, which would imply that he must pay the expense of the horse's keep during the time he retains it. B. goes to an inn and runs up a bill, which he does not pay, and the innkeeper detains the horse. In the meantime A. has sold the horse out-and-out for its full price to C., and C. is informed that the horse is at the inn, he proceeds there to take him away, but is told he cannot take him until he pays the bill, and he pays the bill accordingly and gets his horse; can C., who in order to get his horse is obliged to pay the debt of another, sue that other in an action for money paid? We are clearly of opinion that he could; and without heaping up authorities where it has been held, independent of contract, that a person occupying a property in respect of which there is a claim that ought to have been discharged by another, being compelled to pay, is entitled to reimbursement, we think that this is a case in which the mortgagees, by compulsion of law, have paid a debt for which the Royal Mail Company were liable, a ready money debt which they ought to have provided for on the arrival of the vessel at Sydney, and that, therefore, in respect to the claim for wages the plaintiffs are entitled to recover as on the count for money paid.

There is another claim with which we have to deal, but it is unnecessary to say more with respect to that than that it is claimed in the declaration as consequential damage resulting from an alleged wrong, an alleged conversion or detention of the vessel of the plaintiffs. We agree in the arguments used by Mr. Mellish, that there was no such conversion or detention. When the vessel was taken possession of by the plaintiffs' agent at Sydney she was entirely out of the control of the Royal Mail Steam Packet Company, and what subsequently

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happened by reason of the proceedings in the Admiralty Court was the act of the law. It is true it was the act of the law, traceable to a default of the defendants in not paying the debt which they ought to have discharged, but we are unable to perceive how it can be traced to any wrongful act of conversion or detention. It is a fallacy to say that an action for conversion or detention implies merely that the defendant has not delivered up to the plaintiff the chattel in respect of which it is brought. It implies that the defendant has done something, in either using the chattel for his own purpose, or at least, detaining it from the plaintiff; and in this case, the vessel having been once given up and abandoned, or more properly quitted possession of, by the Royal Mail Company, and taken possession of by the plaintiffs, we think the defendants cannot be charged in an action for detention or conversion simply by reason of their default in payment of wages, in respect of which there was no lien in the sense of property, but only liability to a subsequent process of law by which the vessel was seized. Whether that state of things presents a legal liability which might have been enforced by special action framed to meet the case, it is unnecessary we should decide. Such an action would unquestionably have been novel, and, we are inclined to think, could not have been maintained. We think, in this case, we ought not to go out of our way to add to the proceedings a claim which must be treated as, at best, speculative; especially as under the circumstances the damage, or the greater part of it, in our view of the facts, probably arose from the want of a properly authorized and accredited agent of the mortgagees at Sydney to advance money, or raise it if necessary upon the vessel. As to this claim, therefore, we must give judgment for the defendants.

Judgment for the defendants as to the first and third claims, and for the plaintiffs as to the second claim.

Attorneys for plaintiffs: *Uptons, Johnson, & Upton.*
Attorneys for defendants: *Maynard, Son, & Co.*

HANSON *v.* ROYDEN AND OTHERS. 1867

Ship and Shipping—Wages—Appointment of a Seaman to be Mate. *Nov.* 20.

A. engaged to serve on board a ship as an able seaman for a long voyage out and back. The captain having died shortly after the ship left port, the first mate assumed the command, and appointed A. to act as second mate, and agreed with him that he should receive the pay of a second mate. The ship subsequently touched at several ports, and returned home, A. continuing to act throughout as second mate:—

Held, that the agreement made with A. was binding on the shipowner, and that A. was entitled to wages as second mate.

THIS was an action for wages alleged to be due to the plaintiff, as second mate. The defendants paid into court sufficient to cover his wages as an able seaman.

The case was tried before the late Assessor of the Court of Passage of Liverpool, when it was proved that the plaintiff had engaged to serve on board a ship of the defendants, for a voyage from Liverpool to Peru and back, as an able seaman, and signed the ship's articles as such. Shortly after the ship had proceeded to sea, the captain died, and the first mate then assumed the command, and appointed the second mate first mate, and after a short time appointed the plaintiff to act as second mate, and agreed with him that he should, from that time, receive pay as such. No entry of this arrangement was made in the log or on the ship's articles. The ship touched at several ports subsequently, and on its return home the defendants refused to pay the plaintiff more than the wages which were named in the ship's articles.

The jury found a verdict for the defendants, and leave was reserved to the plaintiff to move to enter the verdict for 9*l.* 3*s.*, being the amount of additional wages claimed by him as second mate.

C. Russell having obtained a rule pursuant to the leave reserved,

Potter shewed cause. There was no consideration for the promise of the acting captain that the plaintiff should receive a mate's wages. The plaintiff was bound to perform all reasonable commands, even though circumstances might render the duties

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more onerous than usual. It is true that he only engaged to perform the duties of an able seaman, but that includes performing the duties usually devolving on the ship's officers, if it should become necessary; thus, if all the officers were washed overboard, one of the seamen must act as master till the ship could be brought to port. In *Dafter* v. *Creswell* (1), Abbot, C.J., said:— "I am decidedly of opinion that if a man signs the ship's articles as a seaman, he can recover no more wages than are there agreed for, however he may be employed on board the ship."

There are some cases in which a higher rate of wages has been allowed by the Court than that originally agreed to, but they are very distinguishable. In *Hartley* v. *Ponsonby* (2), the ship was so shorthanded as to be dangerous to navigate, and the men, therefore, were not bound to proceed to sea with her; and there was, therefore, a good consideration for the captain's promise to them of extra pay, if they would do so. In *Harris* v. *Carter* (3), there was no such danger to the crew in proceeding to sea, and it was held that they could not recover the additional wages. If the plaintiff had gone before the consul at one of the ports at which the ship stopped, and been formally appointed second mate under the powers of the Merchant Shipping Act, the case might have been different. There may, perhaps, be a distinction in the case of the first mate becoming captain, because he became so by a rule of maritime law, without any appointment.

C. Russell, in support of the rule. The first mate, after the death of the first captain, succeeded to his place, and had all the ordinary powers of a captain, and could hire seamen and make such appointments as were necessary for the navigation of the ship: *The Tecumseh*. (4) There is nothing in the Merchant Shipping Acts that makes it necessary that the agreement should be entered on the ship's articles, or that the plaintiff should go before a consul. No doubt, the plaintiff was bound to render any services necessary for the safety of the ship, but only on a temporary emergency, which was certainly not the case here, for the ship touched at several ports, and a second mate might have been

(1) 2 C. & P. 161, 162; 7 D. & R. 650.
(2) 7 E. & B. 872; 26 L. J. (Q.B.) 322.
(3) 3 E. & B. 559; 23 L. J. (Q.B.) 295.
(4) 3 Wm. Rob. at p. 146.

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engaged at the first port she touched at, if the plaintiff had not been appointed. The question raised in this case has been frequently decided in the Court of Admiralty: *The Porcupine* (1); *The Providence* (2), in which case it was also held that an alteration in the ship's articles was not necessary; and other cases cited in Pritchard's Admiralty Digest, vol. ii. p. 980.

BOVILL, C.J. I am of opinion that this rule should be made absolute. The plaintiff sues for wages as second mate, and there is no dispute as to the amount of wages due to him, if he is entitled to anything beyond his wages as an able seaman. The captain of the ship died soon after the ship left Liverpool, and both as a matter of law and from the necessity of the case, the first mate then became captain. He had to appoint the other officers of the ship, and make all the necessary arrangements for navigating it. No doubt, in extraordinary emergencies, the plaintiff would have been bound to exert himself to the utmost, and perform any duties that might have been required of him; but that rule does not apply to the ordinary state of things, when there is no emergency. It could not be doubted that the first mate, on his becoming captain, was entitled to be paid as such; it is, in fact, an implied term of the contract made with him as first mate. The same rule would seem to apply in the case of other persons promoted by competent authority, and we must take it on the evidence that the plaintiff was duly appointed second mate by the captain. The case of *Dafter* v. *Creswell* (3), relied on by the defendants, is more fully reported when it came before the full Court in Dowling and Ryland's Reports (4), and the ground of the decision was that the want of a written agreement deprived the plaintiff of his right to recover. It is not necessary to go through the other cases, which are all rather in the plaintiff's favour; but, in the case of *The Providence* (2), we have the distinct authority of Lord Stowell that the first mate would be entitled to a captain's wages, and all his observations there apply to the present case.

WILLES, J. I am of the same opinion. I have come to this conclusion on grounds which may be peculiar to maritime law, but

(1) 1 Hagg. Adm. at p. 381.
(2) 1 Hagg. Adm. 391.
(3) 2 C. & P. 161.
(4) 7 D. & R. 650.

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which it seems unavoidable that we should adopt. If it is once settled by the maritime law of the country that the first mate succeeds the captain on his death, and becomes captain in his place, it follows that he must be paid as such. He is not only raised to a new station but he incurs new responsibilities and duties. The express provisions of a maritime contract generally include and govern only cases of usual occurrence, and not unusual events, it being implied that if such events should occur, the parties shall act in a reasonable manner, having regard to the character of the contract, the usage in like cases, if any, and the general provisions of the law. Here the original contract provided that the first mate should be paid a certain sum as mate, and if the implied words had been expressed they would have been that this should only apply to ordinary circumstances, and no express agreement, therefore, was made as to what should be paid him if he became captain. I thought at first sight that the cases of *Read* v. *Chapman* (1), and *Ragg* v. *King* (2), were in the defendants' favour, and if so I might have yielded to their authority. In fact, however, they are not so; they are cases in which the first mate libelled for his wages as master in the Admiralty Court, and this Court granted a prohibition on the ground that the Court of Admiralty had no jurisdiction over masters' wages; that has, however, since been altered by statute, and those cases now have only a tendency to mislead. Accordingly in later cases, and particularly in the *Providence* (3), it appears that Lord Stowell considered the first mate entitled to captain's wages. If such is the case when the first mate succeeds the captain, I see no reason why similar principles should not apply to the present case. Whatever may be the case in other services, in our mercantile service there is a great difference between the duties of an able seaman and those of a second mate. It is only necessary further to shew that the plaintiff was duly appointed, and if the original captain would have had authority to appoint him it is clear that the new captain had such authority. I quite agree that the master cannot bind the owner to pay extra for any services, however extraordinary, which fall within the seaman's duties: but the case is different if he is called on to perform services which are not within his

(1) 2 Str. 937. (2) 2 Str. 858. (3) 1 Hagg. Adm. 931

duty, as was the case in *Yates* v. *Hall* (1), which can only be supported on that ground. I do not wish to be taken as referring, in what I have said, to cases of a different kind; but these principles have been acted on in shipping cases, and form part of the maritime law.

KEATING, J. I am of the same opinion. I am desirous of adding an expression of my wish not to be understood as interfering with those cases which have decided that a sailor must use his utmost endeavours in the service of his ship, and is not entitled to any extra wages for doing so, but I think that they do not apply here. The voyage was a long one, and the captain died shortly after starting. We need not consider what would have been the case in a great emergency and for a short period, but here the ship stopped at several ports, and a second mate might have been engaged at one of them, if necessary. I do not, however, wish to put my judgment on grounds less broad than those of my Lord and my Brother Willes, for I think that if a man is employed in fresh duties and with higher responsibilities, he is entitled to be paid accordingly. We are not without authority for the decision we have come to, for the *Providence* (2), is distinctly in point, and I need only refer to the first four lines of Lord Stowell's judgment to shew how clear the matter was in his mind.

Rule absolute.

Attorneys for plaintiff: *Nethersole & Speechly, for J. W. Carr, Liverpool.*

Attorney for defendants: *R. W. Roberts, for J. Cobb, Liverpool.*

(1) 1 T. R. 73. (2) 1 Hagg. Adm. 391.

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NEWELL *v.* RADFORD.

Statute of Frauds (29 *Car.* 2, *c.* 3), *s.* 17—*Sufficient Memorandum—Ambiguity—Parol Evidence.*

On a purchase of flour, J. W., a duly authorized agent of the defendant, made the following entry in a book belonging to N.:

"Mr. N., 32 sacks culasses at 39*s.*, 280 lbs., to wait orders. J. W."

In an action by N. for the non-delivery of the flour, this entry was proved, and it was proved by parol evidence that N. was a baker, and the defendant a flour merchant; and a correspondence subsequent to the purchase was put in relating to the delivery of flour by the defendant to the plaintiff:—

Held, that the above entry was a sufficient memorandum in writing of the contract to satisfy the Statute of Frauds: for that the parol evidence of the relative trades of the parties was admissible, and, independently of the correspondence, shewed that the defendant was the seller and the plaintiff the buyer of the flour.

Vandenbergh v. *Spooner* (Law Rep. 1 Ex. 316) considered.

DECLARATION for non-delivery of 32 sacks of flour.

Plea, non-assumpsit.

The case was tried before Kelly, C.B., at Merionethshire summer assizes, when it was proved that the plaintiff was a baker, and the defendant a flour dealer, and that John Williams, a duly authorized agent of the defendant, had called on the plaintiff and solicited orders, and had made the following entry in one of the plaintiff's books:

"Mr. Newell, 32 sacks culasses at 39*s.*, 280 lbs., to wait orders.
"June 8. John Williams."

The plaintiff subsequently gave orders for the delivery of part of the flour; but the defendant refused to deliver it. A correspondence was put in which had taken place subsequently to the purchase between the plaintiff and defendant respecting the delivery of the flour.

A verdict was found for the plaintiff for 20*l.*, and leave was reserved to the defendant to move to enter a nonsuit or a verdict, on the ground that there was no sufficient memorandum of the contract to satisfy the Statute of Frauds.

J. A. Russell moved for a rule, pursuant to the leave reserved.

The written memorandum must shew distinctly all the particulars of the contract in order to satisfy the Statute of Frauds, and

parol evidence is not admissible to explain any part of the contract which is left in doubt. Here it is impossible to tell from the memorandum which of the parties was the buyer and which the seller, and it is therefore insufficient. The case of *Vandenbergh* v. *Spooner* (1) is a direct authority that such a memorandum is insufficient.

[BYLES, J. Here there is more than the mere memorandum, for there is evidence that the plaintiff was a baker, who would therefore require flour, and the defendant a person who was in the habit of selling it. In *Vandenbergh* v. *Spooner* (1) there was no evidence that the plaintiff was a dealer in marble.]

That evidence is parol, and therefore not admissible; it must appear from the writing itself who is the buyer of the goods.

[KEATING, J. referred to *Sarl* v. *Bourdillon*. (2)]

In that case the book had the title "order book," and the plaintiff's name written in it, and it appeared, therefore, from the written document itself, that the plaintiffs were receiving the order. In this case it is not shewn what was the nature of the plaintiff's book in which the entry was made.

[BOVILL, C.J. The surrounding circumstances are always admissible to explain any ambiguity in the written contract. In *Spicer* v. *Cooper* (3) parol evidence was admitted to shew that the price of 5*l.* mentioned in the memorandum meant by the custom of the trade 5*l.* per cwt.

WILLES, J. *Macdonald* v. *Longbottom* (4) is a still stronger case. There parol evidence was admitted to shew that "your wool" included wool bought of other farmers besides that which came from the plaintiff's own sheep.]

The same argument would have applied in *Vandenbergh* v. *Spooner* (1), and that case was cited, but the Court of Exchequer held extrinsic evidence inadmissible. *Williams* v. *Lake* (5), was a case before *Vandenbergh* v. *Spooner* (1), and to a similar effect. There the name of the person to whom a guarantee was given was not mentioned in the written memorandum, and it was held to be

(1) Law Rep. 1 Ex. 316.

(2) 1 C. B. (N.S.) 188; 26 L. J. (C.P.) 78.

(3) 1 Q.B. 424.

(4) 1 E. & E. 977; 28 L. J. (Q.B.) 293; in error, 1 E. & E. 987; 29 L. J. (Q.B.) 256.

(5) 2 E. & E. 349; 29 L. J. (Q.B.) 1.

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insufficient. The correspondence is not such that the contract could be gathered from it within the authority of the cases, and it makes no reference to the written memorandum.

BOVILL, C.J. In this case it is not disputed that the signature of the agent Williams would be sufficient to bind the defendant, but it is contended that the written memorandum does not sufficiently shew which of the parties was the buyer. At first sight this, indeed, might not appear quite clear, except to a man in the trade; but it has always been held that you may prove what the parties would have understood to be the meaning of the words used in the memorandum, and that for this purpose parol evidence of the surrounding circumstances is admissible, and the cases of *Macdonald* v. *Longbottom* (1), and *Spicer* v. *Cooper* (2), are authorities to that effect. In this case it was shewn that the plaintiff was a baker, and that the defendant was a dealer in flour, which the plaintiff would require for his trade, and, looking at the nature of the entry in relation to those facts, I think there can be no reasonable doubt that it was a sale from the defendant to the plaintiff. If, however, there were any doubt, looking at the entry alone, it is set at rest by the two letters which passed between the plaintiff and defendant, which sufficiently identify the contract, and in which the relative positions of the parties as buyer and seller is distinctly stated.

WILLES, J. I am of the same opinion. If the case of *Vandenbergh* v. *Spooner* (3) had been in point, we should have granted a rule, and perhaps made it absolute, leaving the parties to take the opinion of the Court of Exchequer Chamber. I think, however, that case is distinguishable. I own I have considerable difficulty in understanding that case, but if I do so rightly it amounts to this, that a written agreement "A. agrees to buy B.'s horse for 10*l*." is not sufficient to satisfy the Statute of Frauds, because it cannot be inferred by reasonable intendment that B. is the seller. I cannot help observing that that seems to be an extreme case. The present, however, does not come within its authority, because

(1) 1 E. & E. 977; 28 L. J. (Q.B.) 293; in error, 1 E. & E. 987; 29 L. J. (Q.B.) 256.

(2) 1 Q. B. 424.

(3) Law Rep. 1 Ex. 316.

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here there was a regular entry by the defendant's agent in the plaintiff's book, describing what was to be sold, and the defendant was proved to be a person who sold such goods, and the plaintiff a person who would require to purchase such goods for the purpose of his trade. Taking, therefore, the entry in connection with those circumstances, I think it sufficiently appears from it who was the buyer and who the seller of the goods. There was, moreover, a correspondence which seems to be sufficiently connected with the entry to be available, if necessary, and from which the relation of the parties as buyer and seller clearly appears.

BYLES, J. I am of the same opinion. Mr. Russell has assumed that the words "Mr. Newell" are in the nominative case, but that would not make sense. I think it would be reasonably clear that they were in the oblique case, even if the memorandum had been on a loose slip of paper, but all doubt is removed by the fact that it is an entry in the plaintiff's book. But further, evidence of surrounding facts is admissible to explain the memorandum, as evidence has been held admissible to settle the meaning of the price or of the quantity of goods sold mentioned in a memorandum, *Macdonald* v. *Longbottom* (1), and even to add a new party as principal; and the evidence in this case shews that the occupations of the parties was respectively such as to be consistent only with the plaintiff being the buyer of the goods. There is this distinction from the case of *Vandenbergh* v. *Spooner* (2), the parol evidence which was there tendered was not to shew the surrounding circumstances or the position of the plaintiff as a dealer in marbles, but that the parties had expressed the contract also in other words, and so to vary the terms of the contract itself. I entirely concur in the observations of the Lord Chief Justice and my Brother Willes.

KEATING, J. I am of the same opinion. I think it is impossible to look at the entry without seeing that it is a contract between Newell and Williams with relation to the flour. Then it is said that it cannot be ascertained from the memorandum which is the buyer, and which the seller; but we may look at the surrounding circumstances, and it appears that the entry is in the

(1) 1 E. & E. 977; 28 L. J. (Q.B.) 293; in error, 1 E. & E. 987; 29 L. J. (Q.B.) 256.

(2) Law Rep. 1 Ex. 316.

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plaintiff's book, and that he is a baker, and that Williams was the agent of the defendant, who is a flour merchant. I think, therefore, it is clear, even without the correspondence, what was the relation of the parties to each other; and if that be referred to, it leaves no doubt whatever on the case.

Rule refused.

Attorney for plaintiff: *C. Wilkin.*

Attorney for defendant: *J. H. Lydall, for T. & T. Martin, Liverpool.*

Nov. 18.

PARSONS *v.* THE VESTRY OF ST. MATHEW, BETHNAL GREEN.

Highway—Vestry—Liability for omitting to Repair a Road—Metropolis Local Management Act (18 & 19 *Vict. c.* 120), *ss.* 96, 98.

An action for the non-repair of a highway will not lie against a vestry appointed under the Metropolis Local Management Act (18 & 19 Vict. c. 120).

DECLARATION. That before and at the time of the grievances thereinafter mentioned, the common highway thereinafter mentioned had been and was a parish highway for passengers, horses, and carriages, that is to say, a highway of the parish of St. Mathew, Bethnal Green, situated within the said parish, and repairable and maintainable by the defendants, and ought then to have been in a proper state of repair and so maintained by the defendants. Yet the defendants wrongfully permitted and suffered the highway to be and continue and the same was then out of repair and not properly maintained, and in a state and condition dangerous to passengers using the same with horses, carts, and carriages, and a dangerous hole was then wrongfully and negligently permitted by the defendants to be and the same was then in the highway, contrary to the statutes in such case made and provided, and their duty in that behalf; that by reason of the premises a certain horse of the plaintiff's, with which the plaintiff was then lawfully passing along and using the highway, tripped and fell and was injured, whereby the plaintiff incurred great expense, &c.

Demurrer (referring to 18 & 19 Vict. c. 129, s. 96, and 25 & 26 Vict. c. 102, s. 106) and joinder.

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Raymond, in support of the demurrer. The question in this case is, whether the metropolitan vestries are liable to an action for the non-repair of highways under 18 & 19 Vict. c. 120, ss. 96, 98. At common law the obligation to repair highways was on the parish —i. e., all the inhabitants of the common law district—and that duty can have been transferred to or imposed on the metropolitan vestries only by express enactments. The scheme of the Metropolis Local Management Act, 18 & 19 Vict. c. 120, was to divide the parishes in and round London into classes A. and B.; the parishes in class A being under the management of vestries, and those in class B under boards of works. In the parishes in class A the new vestries superseded the old vestries, and the powers of commissioners of sewers, paving commissioners, and surveyors of highways were vested in them (ss. 68, 90, 96). The 96th section puts the vestry in the place of the surveyor of highways, and the 98th section gives them the power to exercise such jurisdiction, but neither section imposes on them any new duty. Where the act imposes on the vestry the duty of exercising the powers conferred on it the words are imperative, as in ss. 130, 133, 134; but the 98th section gives them only a discretionary power, because they are to act only as agents for the parish, and not by virtue of original powers. It was decided in *Young* v. *Davis* (1), that a surveyor of highways is not liable to an action such as the present. In the case of *Hartnall* v. *Ryde Commissioners* (2) the act by which the commissioners were appointed expressly made them liable to an indictment if they did not keep the roads in repair.

Baylis, in support of the declaration. The 42nd section of the act (18 & 19 Vict. c. 120) incorporates the vestries, and the 96th section then casts upon them the duty of repairing the highways; and it follows that any person who has suffered special damage from their neglect in that behalf has a right of action against them. The vestry is not put in exactly the same position as a surveyor of highways had been, for the latter acted under the parish, and as their agent, while the vestry is to perform its duties exclusively of any other person. The parish, therefore, could not now be indicted for the non-repair of a highway, because

(1) 7 H. & N. 760; 31 L. J. (Ex.) 250; in error, 2 H. & C. 197.

(2) 4 B & S. 361; 33 L. J. (Q.B.) 39.

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the exclusive right to repair the highways being in the vestry, the parish is not even entitled to repair them, and cannot therefore be liable for neglecting to do so. The case of *Young* v. *Davis* (1) was decided on the principle of respondeat superior, the surveyor of highways being a servant of the parish; the vestry is not a servant of the parish, but represents it. The parish have no powers of making rates, and if an indictment were brought against one of the parishioners, and he were compelled to repair the road, he would have no power of recompensing himself. The vestry have a power of making rates under s. 158, and the power of making rates is one ground of the liability of the parish. The vestry, in fact, is in the position in which the parish formerly was, and the only reason an action would not lie against the parish was, that it was not incorporated, but the vestries are incorporated.

Raymond, in reply. The duty of repairing the highways is nowhere taken away from the parish; they are not bound to elect the vestry, and if they did not, would they not be liable if they did not keep the highways in repair?

[BYLES, J. According to the 98th section, the vestries are to repair the streets as they think proper; could the parish interfere if the vestry repaired a road in a way of which they did not approve?]

Not except by refusing to elect the same men on the vestry for the future. There is no doubt the vestry have a wider discretion than the old surveyors of highways.

BOVILL, C.J. Before the passing of the Metropolis Local Management Act (18 & 19 Vict. c. 120) there were certain duties resting on the parish, and certain other and distinct duties resting on the surveyor of highways. The parish was bound to repair the highways, and was liable to an indictment for their non-repair. The surveyor of highways was not liable to an indictment, nor could an action be brought against him, if the highways were not repaired. The latter was decided in the case that has been cited: *Young* v. *Davis*. (1) What, then, was the effect of the act above referred to? By s. 90 extensive powers and duties are transferred from the parish to the vestry, but that section does not transfer to

(1) 7 H. & N. 760; 31 L. J. (Ex.) 250; in error, 2 H. & C. 197.

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the vestry all the duties that previously rested on the parish, nor is the duty now in question one of those transferred.

The 96th section transfers to the vestry the duties and liabilities of the surveyor of highways, but there is no mention of the duties and liabilities of the parish; and if it had been intended to transfer them, express words would have been used. That section, therefore, I think, only rendered the vestry subject to those liabilities to which the surveyor of highways had been previously subject. The 98th section, which is the only other section relied on by the plaintiff, is not imperative in terms, and, from the expression, "it shall be lawful for every vestry," it would appear that it was intended to give them a discretion whether to repair the streets or not. There is nothing in the section transferring to the vestry the rights and liabilities of the parish, though it gives the vestry additional powers to those previously possessed by the surveyor of highways; and Lord Ellenborough held, in *Rex* v. *Inhabitants of St. George, Hanover Square* (1), that the mere fact of an act of parliament imposing on other persons the duty of repairing a highway does not relieve the parish of its common law liability to repair.

The case of *Hartnall* v. *Ryde Commissioners* (2) is entirely distinguishable, the ground of the decision there being that the duty of repairing the roads was expressly imposed on the defendants by the act of parliament.

WILLES, J. I am of the same opinion. The defendants are a parish body elected under the provisions of the Metropolis Local Management Act (18 & 19 Vict. c. 120), and that act in effect provides that, for the convenience of the parish, they shall perform the duties previously performed by the surveyor of highways, and pay the expenses thereby incurred by rates which they are authorized to raise. They must act in this respect either as officers of the parish, and then the parish must answer as principal for the neglect of their duties, and *Young* v. *Davis* (3) is an express authority that the officers are not liable; or else they must act as representatives of the parish, and then their liability will be a reflexion of the

(1) 3 Camp. 222.
(2) 4 B. & S. 361; 33 L. J. (Q.B.) 39.
(3) 7 H. & N. 760; 31 L. J. (Ex.) 250; in error, 2 H. & C. 197.

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liability of the parish which they represent, and against the parish no such action as this could be brought. The case of *Mackinnon* v. *Penson* (1) would then be in point. On either supposition, then, no action will lie against them for mere nonfeasance, such as is the ground of the present action. The liability of turnpike trustees offers some, though not a complete, analogy: *Whitehouse* v. *Fellowes*. (2) They have been held liable to an action for misfeasance, but never for mere non-repairs.

The case of *Hartnall* v. *Ryde Commissioners* (3) is quite distinguishable, and is only an application of the principle laid down by the House of Lords. For not only did the 48th section of the act (10 & 11 Vict. c. 84) provide that the inhabitants of the parish should not be liable, but the 49th section provided that the commissioners should be indictable for the non-repair of the roads; the inhabitants would have been indictable before the passing of the act.

I cannot bring myself to think that it was the intention of the legislature, in transferring to the vestry the duties of the surveyor of highways, to give to every one who may meet with any accident from an imperfection in the road a right of action which he never previously possessed, and thus open a wide door to continual litigation.

BYLES, J. I am of the same opinion. I felt some doubts during the argument, and I am not altogether free from them now; but I think that the act admits of the construction placed upon it by my Lord and my Brother Willes, and that such an action as the present will not lie against the defendants. The 96th section of the act (18 & 19 Vict. c. 120) gives the defendants the powers and duties of a surveyor of highways. They are, in fact, both servants and masters, standing in the position both of the surveyor of highways and of the parish, but in the former capacity they would not be liable, *Young* v. *Davis* (4): and in the latter capacity they would not have any responsibility which had not formerly belonged to the parish, and there is no authority for

(1) 8 Ex. 319; 22 L. J. (M.C.) 57; in Ex. Ch. 9 Ex. 609; 23 L. J. (M.C.) 97.

(2) 10 C. B. (N.S.) 765; 30 L. J. (C.P.) 305.

(3) 4 B. & S. 361; 33 L. J. (Q.B.) 39.

(4) 7 H. & N. 760; 31 L. J. (Ex.) 250; 2 H. & C. 197.

saying that the parish could have been sued for such a cause of action; while the case of *Mackinnon* v. *Penson* (1), which is at least analogous, seems to shew the reverse. There would seem to be good reason why the parish should not be relieved of its liability for the non-repair of the highways by the appointment of the vestries; for if they were so, by appointing dishonest and irresponsible persons, they might deprive the public of all remedy. In the case of turnpike roads, it has been repeatedly held that the fact of the trustees being liable to repair does not prevent the parish being so also, and that would seem to afford a close analogy to the present case. I desire to be understood as saying nothing with respect to the defendant's liability for acts of misfeasance.

KEATING, J. I shared in the doubts of my Brother Byles, feeling pressed by the wide words used in the act; but I think the act is susceptible of the meaning put upon it by my Lord and my Brother Willes, and I think we ought to put that construction on it to avoid the great evils of increased litigation which have been pointed out by my Brother Willes.

Judgment for the defendants.

Attorney for plaintiff: *T. W. Payne.*
Attorney for defendants: *Wm. Phillips.*

(1) 8 Ex. 319; 22 L. J. (M.C) 57; in Ex. Ch. 9 Ex. 609; 23 L. J. (M.C.) 97.

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Nov. 11.

TOOMER AND ANOTHER, APPELLANTS; REEVES, RESPONDENT.

Turnpike Act—3 *Geo.* 4, *c.* 126, *s.* 32—*Exemption from Toll*—*Public Stores.*

By 3 Geo. 4, c. 126, s. 32, any waggon conveying commissariat stores for the use of her Majesty's forces, is exempt from toll.

T., a contractor for the supply of forage for the use of her Majesty's forces at A., was bound by his agreement to keep at A. a supply of forage sufficient for at least fourteen days' consumption. The deputy commissary-general had a right to inspect the forage at the store, and reject all that was of inferior quality. A waggon belonging to T. was conveying forage to the store at A., bonâ fide intended to be there delivered in performance of the agreement, and for the use of her Majesty's forces:—

Held, that the waggon was exempt from toll.

London and South Western Railway Company v. *Reeves* (Law Rep. 1 C. P. 580), affirmed.

CASE stated under 20 & 21 Vict. c. 43, by Justices for the county of Hants.

The respondent was charged under 4 Geo. 4, c. 95, s. 30, with taking toll from persons exempt.

The respondent was the collector of tolls at the Farnborough turnpike gate, and had demanded and taken toll from the appellants for a waggon and two horses, under the following circumstances:—

The appellants were the contractors for the supply of forage to her Majesty's forces at Aldershot, under a contract, by which it was provided, amongst other things, that the contractors should deliver hay at Aldershot camp and command, in such quantities, at such times, and at such barracks or camps as might be required within the command by the proper officers, and that the deputy commissary-general or other officers acting for him should have a right to inspect the supplies, and reject any not of the quality specified in the contract: see contract set out, Law Rep. 1 C. P. 580.

At the time in question, the appellants under the contract were, by their servants, conveying in the waggon hay to Aldershot camp.

At the time when the toll was demanded, the hay had not been inspected or approved by any person on behalf of her Majesty,

nor had the same nor any part thereof been actually delivered or offered to be delivered to any person on behalf of her Majesty, or on behalf of her Majesty's forces or commissariat.

It was contended on behalf of the appellants that no toll was payable, inasmuch as the waggon and horses were within the exemptions from toll mentioned in 3 Geo. 4, c. 126, s. 32, and were a waggon or other carriage and horses drawing the same conveying commissariat or other public stores for the use of her Majesty's forces.

The respondent contended that the waggon and horses were not within the exemption.

The justices were of opinion that the waggon and horses were not within the exemption, and dismissed the information.

The question for the opinion of the Court was whether the justices were right.

C. W. Wood (*J. H. Mangles* with him), for the appellants. This is an exactly similar case to *London and South Western Railway Company* v. *Reeves* (1), except that the waggon in this case belonged to the contractors instead of to their agents the London and South Western Railway Company. It is brought, in fact, in order that that case may be reconsidered, no one having then appeared for the respondent. The only ground for saying that this waggon is not within the exemptions in the Turnpike Act (2), appears to be that the proper officers had a right to reject the hay if not according to contract; but if a recruiting sergeant were taking recruits down to head-quarters, they could not be compelled to pay the full fare because they might be rejected if found, after medical inspection, unfit for the service. [He was stopped by the Court.]

Harington, for the respondent. In the previous case the whole of the contract was not before the Court. The effect of the contract is to prevent the property in the hay passing to her Majesty till after it has been inspected.

[BOVILL, C.J. It is clear that under s. 32 the hay need not be

(1) Law Rep. 1 C. P. 580.

(2) 3 Geo. 4, c. 126, s. 32, enacts, "that any waggon . . . employed in conveying . . . commissariat, or other public stores of or belonging to his Majesty, or for the use of his Majesty's forces," shall be exempt from toll.

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the property of her Majesty, in order to exempt the waggon from toll; it is sufficient, if it is for the use of her Majesty's forces.]

In the former case Erle, C.J., referred to the question of the property passing, and said: "It is clear that the fact that her Majesty can refuse to receive the stores, if of inferior quality, cannot prevent their being her property."

[BOVILL, C.J. That passage is omitted in the report of the case in the Law Journal. (1)]

At any rate the hay must be irrevocably devoted to the use of her Majesty's forces. Here the appellants, after passing through the gate, might have sold the hay to any other person without breaking the contract, and have sent other hay in its stead to Aldershot.

[BOVILL, C.J. We must take it that the appellants were bonâ fide conveying the hay to Aldershot under the contract. If 8000 bricks were brought to repair a bridge under a contract with the county surveyor, and only 6000 were used, the whole 8000 would have been brought for the purpose of repairing the bridge, and would have been properly exempt from toll under a previous provision of s. 32.]

If the stores were once brought under the control of the persons for whose benefit the exemption has been established, no doubt they would be free; but if the appellants' contention is correct, the persons of whom the appellants bought the hay could have brought it to them without paying toll from the other end of the country, which is certainly beyond the intention of the act.

C. W. Wood, in reply, was not called on.

BOVILL, C.J. No counsel having appeared for the respondent in the former case, we were not unwilling to hear what the ingenuity of Mr. Harington might be able to suggest, to satisfy the Court that they ought to have arrived at a different conclusion. After hearing carefully the arguments, it appears to me there is no doubt whatever that the toll was not payable in this case, and that the case was brought within the exemption granted to stores for the use of her Majesty's forces. There is a pointed distinction in the act of parliament between "stores belonging to her Majesty," and "stores for the use of her Majesty's forces."

(1) 35 L. J. (M. C.) at p. 240.

Mr. Harington says that the stores must either be the property of her Majesty or under the control of her Majesty. But that is not the language of the act of parliament. Were these, then, "stores for the use of her Majesty's forces," or were they not? There was a contract to supply hay, and it is found that this hay was supplied under that contract. And it seems to me, therefore, to come both within the terms and the intention of the act of parliament. It is said the hay may or may not be for the use of the forces, and that the person who has charge of the hay might afterwards use it for some other purpose. But supposing the appellants had, on passing through the toll-gate, made a statement that it was for the use of the forces, and under this contract, and they had afterwards conveyed it to some private stable, then they might have been proceeded against before the magistrates, and the magistrates would have had no hesitation in coming to the conclusion that the hay was not for the use of her Majesty's forces, and that the appellants had evaded the toll, and made themselves liable to a summary conviction for the non-payment of the toll. Of course the magistrates must be satisfied that it was for the use of the forces, just as any other tribunal must be satisfied where the question is, whether there was a bonâ fide intention of taking a thing for a particular purpose. I called attention, in the argument, to the circumstance that, in the early part of the section, all the materials that are taken for the purpose of repairing a high road, or a highway, or a public bridge, are mentioned; they may be taken bonâ fide for the purpose, although they may not be used for the purpose, and not received by the surveyor, and they would, if so, be exempt from toll. I do not agree with the suggestion of Mr. Harington, that a person who supplies a contractor would be exempt from toll while bringing hay from a distant part of the country. If any such case were put forward, I do not think any tribunal would hesitate in saying that such stores were not for the use of her Majesty's forces, but for the contractor. I do not see, therefore, the slightest reason for throwing doubt on the decision of the former case, although there seems some little difference in the report of the case in the Law Reports and in the Law Journal. I think there must be some mistake in the Law Reports, because the judgment of the Court did not proceed on

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the ground of property, nor could it, but it is put entirely on the distinction that these were stores for the use of her Majesty's forces; the only doubt suggested is, in consequence, probably, of some slight inaccuracy in the report on that subject. (1)

WILLES, J. I am of the same opinion.

BYLES, J. I am of the same opinion. I was, I believe, present at the time of the former decision, and my impression is that that decision entirely turned on the latter branch of the clause in the act of parliament, viz., "for the use of her Majesty's forces;" (2) it is to be observed here that the vendor who was conveying this property, intended it for the use of her Majesty's forces, and it further I think appears that he had appropriated this very hay to that purpose, though possibly he might have revoked that appropriation, but in the then state of things he intended and had appropriated these stores for that purpose; the stores, therefore, come within the terms of the exemption. With respect to the construction of the exemption, it is true that the act of parliament itself imposes the toll, and that this is an exemption from it, but it is an exemption in favour of the crown, and in favour, especially in this case, of the public, and without saying that it should be favourably construed, as the Court said even with respect to an exemption in favour of agriculture, in *Higginbottom* v. *Perkins* (3) in this Court, it is to have a fair, reasonable, and not strict construction.

(1) In consequence of the doubt expressed as to the accuracy of the report of *London and South Western Railway Company* v. *Reeves* in the Law Reports, that report has been submitted to the late Lord Chief Justice, Sir William Erle. In reply, Sir William Erle says: "The report states exactly what I meant, and, I believe, what I said;—stores for the use of her Majesty's forces are exempt from toll: these stores were for the use of her Majesty's forces, ergo exempt. As to the argument that property cannot pass where there is a right to reject, lex non ita. Furthermore, the argument, if sound, would be nihil ad rem."

As to the property passing notwithstanding the vendee has a right to reject, see Blackburn on the Contract of Sale, p. 126, et seq.; *Wait* v. *Baker* (2 Ex. at p. 7; 17 L. J. (Ex.) at p. 310); *Laughton* v. *Higgins* (4 H. & N. 402; 28 L. J. (Ex.) 252).

(2) The words in the judgment of Erle, C.J., with respect to the property passing, had reference only to the argument used on behalf of the respondent before the justices. See note (1).

(3) 8 Taunt. 795.

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KEATING, J. I am quite of the same opinion. I think that the act of parliament intended to exempt not only stores belonging to her Majesty, but stores going for the use of the forces. It is in vain to attempt to distinguish this case from the case that was before the Court on the previous occasion, and there it was held that the stores were proceeding for the use of her Majesty's forces, and I see no reason whatever to dissent from that decision.

Judgment for the appellants.

Attorney for appellants: *L. Crombie.*

Attorney for respondent: *Dyne & Harvey, for Hollest & Mason, Farnham.*

RAWSTORNE *v.* BACKHOUSE.

Nov. 25.

Salmon Fishery Acts (24 & 25 *Vict. c.* 109; 28 & 29 *Vict. c.* 121)—*Prescription—Right to used fixed Engines.*

A., being lord of the manor of H., claimed to be entitled, within the provisions of the Salmon Fishery Acts (24 & 25 Vict. c. 109; 28 & 29 Vict. c. 121), to use reasonable fixed engines in the river R. in reasonable places within the manor of H. In support of the claim he produced certain old documents shewing that there had been a fishery from the earliest times in that part of the river R. He also gave evidence to shew that for many years previous to the year 1844 fixed engines had been used in various hollows formed in the sands of the river. That at that time a wall was built to improve the navigation under an act of parliament, by which the rights of all lords of manors were expressly saved, and that through the building of the wall the bed of the river was changed, and convenient hollows for placing the engines were formed close to the wall. That previous to the year 1844 the engines were never placed nearer than 200 yards to the place where the wall now stands, but it did not appear whether there were then any hollows worth fishing within that distance. That since that time the fixed engines had been placed in hollows close to the wall, and had never been placed on the sites where they had been used previously to 1844. In a case stated by the commissioners for the opinion of the Court whether they were bound as matter of law to find that the claimant was entitled to use the fixed engines as claimed:—

Held, that it was a mixed question of fact and law whether the using the engines in places since 1844 different from those in which they had been used previously amounted to an enhancement of the engines, and that the commissioners were not, therefore, bound as *matter of law* to find that the claimant was so entitled.

THE following case was stated for the opinion of the Court by the Special Commissioners for English Fisheries, pursuant to the

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Salmon Fishery Amendment Act, 1865 (28 & 29 Vict. c. 121), s. 45, upon a claim made by Robert Rawstorne that four baulks, or stake-nets, situated in the estuary of the River Ribble between high and low-water mark, of which baulks or stake-nets Rawstorne was the owner, were "privileged fixed engines," within the Salmon Fishery Acts.

1. By the Salmon Fishery Act, 1861 (24 & 25 Vict. c. 109), s. 11, it was enacted that no fixed engine of any description should be placed or used for catching salmon in any inland or tidal water; and there was added the following proviso:—"But this section shall not affect any ancient right or mode of fishing as lawfully exercised at the time of the passing of this act by any person by virtue of any grant or charter or immemorial usage."

2. The fixed engines thus saved from the operation of s. 11 were declared by the subsequent statute, 28 & 29 Vict. c. 121, s. 39, to be "privileged fixed engines."

3. By the Salmon Fishery Act, 1865 (28 & 29 Vict. c. 121), s. 40, the Special Commissioners for English Fisheries were authorized to inquire into the legality of all fixed engines erected or used for catching salmon within the limits of the Salmon Fishery Acts, 1861 and 1865, and to abate and remove all such as were not proved to their satisfaction to be privileged. By s. 44, on the appearance of the owner or other person for or against any fixed engines, and after hearing what was alleged by him or them, or on his or their behalf, the commissioners were authorized to decide as to the legality or illegality of the said fixed engines; and, in the event of their decision being in favour of the illegality of any engine, they were authorized, by warrant under their hands, to order the owner to abate and remove the same. And by s. 41 of the Salmon Fishery Act, 1865, if the commissioners find a fixed engine to be privileged, they are to give a certificate stating the situation, size, and description of such engine.

4. By 28 & 29 Vict. c. 121, s. 39, it was provided, that, whereas 24 & 25 Vict. c. 109, s. 11, exempted only from the section last mentioned such fixed engines as were in use for catching salmon during the open season of 1861; and, inasmuch as in certain cases fixed engines in use during the four years previous to 1861, or one of such years, might from temporary causes have been out of use

during the year 1861, and it was expedient to provide for such cases, it was thereby declared that, if any fixed engine not in use in 1861 was in use during one of the said previous four years, proof of its user during one of such four years might be substituted for proof of its user during 1861, so, nevertheless, that no person should, by proving the use of different fixed engines during the said years, be allowed to be entitled to a number of privileged engines exceeding the greatest number of such engines in use by him during some one of the years 1857, 1858, 1859, 1860, 1861.

5. The Salmon Fishery Act, 1865, by s. 2, is to be read as one with the Salmon Fishery Act, 1861; and, by the 4th section of the last-mentioned act, "fixed engines shall include stake-nets, bag-nets, putts, putchers, and all fixed implements or engines for catching or for facilitating the catching of fish."

6. At the hearing of the claim before the commissioners, the appellant made his claim for four baulks or stake-nets as being privileged fixed engines within the meaning of the above statutes, and, in proof of the legality of such engines, he tendered the following documents of title relating to the manor of Hutton, of which he was the lord, and within which manor the said engines were alleged to be:—

I. A charter of 7 & 8 Ric. 2, of which it was admitted a correct copy was printed in Dugdale's Monasticon Anglicanum, vol. i., p. 907, which charter contained an inspeximus, inter alia, of a grant made by Helias de Hoton to the Abbey of Cockersand in the township of Hutton, with all liberties, &c., in moors and marshes, fisheries and fishings in rivaries and pools, &c. (in piscaries et piscationibus in rivaries et stagnis).

II. A charter of 37 Hen. 8, whereby, in consideration of 560*l.*, the King granted to Lawrence Rawstorne all our lordship or manor of Hutton, with all rights, &c., heretofore belonging to and part of the possessions of the monastery of Cockersand, and also all moors, marshes, fishings, waters, fisheries, &c.

III. A deed of indenture in counterpart, dated 11th of March, 1757, between Lawrence Rawstorne on the one part, and the owner of the opposite shore of the Ribble, Sir Henry Hoghton, lord of the manor of Lea, on the other part, reciting that each was seised of a fishery on the Ribble up to the mid-stream, and that disputes

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touching the manner of fishing had occurred between their tenants, and, in order to establish the ancient just and rightful manner of fishing, they thereby covenanted and agreed to fish in manner following,—by setting baulks, stakes, and piles overcross the whole river, to continue or to be removed from time to time to other places during the fishing season, or as long thereof as the party setting the same shall think proper, and to fasten nets thereto, and by that or any other lawful ways or means to fish alternatively overcross the whole river, as well on their own side as on the contrary side of the same river, the owner or occupier on one side having one day's fishing, &c.

IV. An inquisition of the court-baron of the manor of Hutton, dated the 13th of April, 1787, which described the boundaries of the manor as extending to the mid-stream of the Ribble, and including the site of the said baulks. At the end of the inquisition was the following sentence:—"And we the jurors aforesaid do further find that the said Lawrence Rawstorne, in right of his said manor and estates, hath an exclusive several fishery to the mid-stream of the river Ribble, beginning at the line from the said Cross or More Stone across the said river to the great stone in Rimshaw headland, and ending at the line from St. Catherine's Well to the third butt or furrow in Cook Hey, alias Blackledge Bank, where a stone is placed."

V. There were divers mesne conveyances, and finally a will dated 1850, devising the said manor to the appellant, the present lord of the manor.

7. There was no specific mention, otherwise than as above stated, in the charters or in the inquisition of the court-baron of stake-nets or other fixed engines as being used in the said fishery; and the only mention of stake-nets or baulks in the documents of title was in the above indenture of 1757. At the present day, fishing with stake-nets or baulks is not practised on Sir Henry Hoghton's side of the river; the sands over which his fishery extended having been for several years past reclaimed and converted into agricultural land. It was proved that the sites of the claimant's stake-nets were *within the limits* of the manor, as described in the inquisition of 1787; and the boundary of the manor along the Ribble was about three miles.

8. At the place in question the Ribble is a navigable tidal river; and the channel, which was previously tortuous and winding, has been since 1844 straightened and confined within parallel sea-walls about one hundred yards apart, and at high tides the water previously to 1861 (taking into account the land on both sides), covered a space varying from about a mile and a half wide at the eastern or upper end to nearly two miles and a quarter wide at the western or lower end; but such space at the last-mentioned end has been about six years ago contracted by embankments to the width of about one mile and three quarters only.

9. The steward of the estates produced rental books, which contained entries of rents received from tenants from 1803 to 1854. Each year there was an entry of the tenant's name connected with the fishery, thus,—"1803. James Singleton, the fishery, 10*l*." In 1854, the fishery was let for 6*l*. The rent had fluctuated very much between 1803 and 1854, being mostly about 10*l*.; the highest rent being 40*l*., in 1841. Since 1854, the appellant has kept the fishery in his own hands, and has fished it in the manner hereinafter described.

10. It was proved by the oldest witnesses,—one of whom deposed to a personal knowledge of sixty years,—that three baulks only were used; but latterly there had been four; and in 1861 there had been four baulks used. Three of these were situated close to the river wall, being nearly at right angles to the current, each baulk being somewhat of a crescent form; and one end of the baulk was close to the river wall. The first baulk, or west baulk, was 220 yards long. The second, or middle baulk, was 400 yards long, and about 500 yards distant from the first baulk. The third, or higher middle baulk, was generally about a mile and two thirds from the second baulk, and it was 350 yards long. The fourth baulk was generally about three quarters of a mile from the third baulk, and was seventy-five yards long.

11. The mode in which the baulks or nets were set was proved to be as follows:—In a direction nearly at right angles to the direction of the current, but in a crescent shape, stakes each six feet long were driven or worked into the sand. A baulk consists of a series of separate nets, each thirty yards long and six feet deep joined together with stakes. The distance from stake to stake is

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twelve feet. Each baulk was set across a hollow in the sand. The net was fastened to the upper part of the stakes, and the lower part of the net being free, so that, while the tide came out, the bottom of the net floated out on the top till it gradually rose with the tide to a horizontal position, and was no obstruction to the fish; but, when the tide receded, there was a readying stake which was attached to the net at every interval of twelve feet, and this readying stake kept the net erect. The readying stake being five feet long, while the net was six feet deep, the net, when kept erect, formed a kind of bag, and received the fish as they were returning with the ebbing tide. The fish are only caught on the ebb tide. The nets and stakes help to support each other. During spring or neap-tides, there were generally four or five feet of water above the top of the stakes.

12. Witnesses were called,—one of whom was aged seventy-four, —who recollected these fisheries sixty years ago, and there were nets then and since used at the hollows in the sand just as they were used now. Old men deceased had also told these witnesses that in their time the nets were used in the same way. Before the river walls were straightened in 1844 by virtue of the Ribble Navigation Acts, there were several of these hollows, and nets were placed in some of them; but no nets were ever seen by the oldest witness, aged seventy-four, to be placed in any hollow nearer than 200 or 300 yards from the main channel, and they were generally half a mile distant; while a younger witness, aged fifty-six, said he had never seen them nearer than 100 yards from the main channel. After the river walls were built, which stand in some places about three feet above the level of the sands, new hollows were formed close behind the river wall by the action of the tide on the wall; and the nets had been since that time always placed in these hollows, because they caught more fish. One end of the net was on a few occasions fixed upon the top or side of the river wall; but the appellant did not claim to use the wall for this purpose, but merely claimed to put one end of the net as close to the river wall as might be necessary for fishing the hollows behind it. There were other hollows, but at a considerable distance from the walls, and smaller in size. About fifty years ago, this channel for about half a mile ran almost close to the land on the Hutton side, and

so continued for a year or two; and during that time no baulks were placed on that part of the fishery; but, when the channel retired further back and left wide sands, the baulks were put down again.

13. The Ribble Navigation Acts authorized the straightening of the navigable channel and the building of the river walls in 1844; and one of these acts, the 16 & 17 Vict. c. clxx. s. 154, saves the rights of all lords of manors, but otherwise the acts are silent as to the fisheries in question.

14. On the part of the respondent, it was contended that the user of the baulks had not been consistent or certain; and that there was upon the whole no evidence that the baulks were more than sixty years old, and therefore they must be illegal.

15. On the other hand, the claimant, the now appellant, contended that the charter of Ric. 2, coupled with the modern user, constituted evidence from which the commissioners were bound to presume that the baulks were privileged fixed engines; that there was, apart from any of the documents produced, abundant evidence (which was uncontradicted) of the immemorial user of such baulks to entitle the appellant to a certificate under 28 & 29 Vict. c. 121, s. 41, and that in 1861 and previously the owner could have placed the baulks in those hollows in the sands out of the main channel which were most favourable to fishing within the limits of his manor, and that he was equally entitled to place them close to the river wall which had been made in 1844, and that such new sites were substantially the same as the previous sites; that, on these grounds, the commissioners were bound to find these baulks, which were legal in 1861, to be privileged now; and that, as to their sites, it was sufficient compliance with the 41st section of the act of 1865, 28 & 29 Vict. c. 121, to describe them as situate on the south shore of the river Ribble, within the manor of Hutton, without further particularizing the exact spots.

16. The commissioners found as facts that the baulks claimed were situate on the sands within the manor of Hutton; that, before 1844, they had never been placed in any hollow nearer the main channel of the river than 100 yards; that there was, on the other hand, no evidence that there were any hollows worth fishing within that distance; that the removing the baulks close to the river

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walls in 1844 was an enhancement of the engines; and that there had been no user of the baulks since the year 1844 on the sites on which they had always been placed before 1844.

17. The commissioners held that the baulks claimed came within the description of kiddles prohibited by Magna Charta and the statutes 25 Edw. 3, stat. 4, c. 4, and 45 Edw. 3, c. 2, and that, as Magna Charta prohibited not only a several fishery being created in tidal rivers, but also prohibited kiddles being used or enhanced in fisheries, it was necessary for the appellant to produce evidence either of a grant of the Crown prior to Magna Charta, or evidence from which they might reasonably presume such a grant, not merely of a several fishery, but of the right to use fixed engines, such as baulks, in such fishery; that the charter of Ric. 2, even if some evidence of a several fishery appurtenant to Hutton manor, did not contain more than the usual words of form used in all conveyances, and did not import that any fixed engines were then used or authorized; that the indenture of 1754 was a private arrangement between two neighbouring owners, and was not binding on, nor could be used to prejudice, the public, and moreover no proof was given that such agreement as to alternate fishings was ever acted upon; that the inquisition of the court-baron omitted all mention of baulks which, if they then existed, it was natural to expect would be specified in such a document; that the earliest evidence of the existence of baulks was in 1806. From the whole of the evidence the commissioners drew the conclusion that, although they might reasonably presume that the lords of Hutton enjoyed a several fishery created before Magna Charta, extending to the mid-stream of the river, no grant to use baulks was ever made by the Crown prior to Magna Charta and to the ancient statutes preceding and including that of 2 Hen. 6, c. 15: and they declared that all the stake-nets in the manor of Hutton were illegal, and they made their order that they should be abated and removed. They further held that the baulks were illegal, inasmuch as since the year 1844, when the river walls had been built, the baulks had been enhanced by their site being changed to a position close to such walls, which was altogether a different site relatively to the navigable channel of the river from that to which the previous user confined them, and thus there was no user in the

years 1857 to 1861 of the baulks on the sites where alone they were legal.

The questions of law for the Court were,—first, whether, on the evidence and facts as found, the commissioners were bound, as matter of law, to presume and to find that the baulks were privileged fixed engines within the meaning of the Salmon Fishery Acts, 24 & 25 Vict. c. 109, s. 11, and 28 & 29 Vict. c. 121, s. 39. If the Court should be of opinion in the affirmative, then,—secondly, whether their certificate ought to describe the site of the baulks to be on the south shore of the river Ribble on the lands in the manor of Hutton, without further defining the exact spots.

June 6. *Mellish, Q.C.*, and *Edwards*, for the appellant. It is not disputed that these baulks have been used for more than sixty years, subject to the consideration of the change of their position, and in the absence of any evidence to the contrary, a jury is bound to presume a grant from such a use if it can have had a legal origin. In this case it was not even necessary that there should have been an express grant of the baulks, because it would seem, though it has never been expressly decided, that when a person had the soil of the river, and also a several fishery in it before Magna Charta, he was entitled to use fixed engines, and if he actually did so, they would not have been rendered illegal by any of the subsequent statutes. It is true that *Duke of Somerset* v. *Fogwell* (1), shews that the owner of a several fishery in a navigable river, cannot be presumed to be the owner of the soil, but here it is expressly found that the soil on which the baulks have been placed is within the limits of the manor. It is clear that these fisheries, therefore, may have had a legal origin: *Malcomson* v. *O'Dea.* (2)

[BYLES, J. The real question is, whether the moving the baulks to within 100 yards of the bed of the river was an enhancement of them?]

To enhance does not mean to increase, but simply to set up: *Williams* v. *Wilcox.* (3) It depends, therefore, upon what grant ought to be presumed from the user which has been proved. The river is always changing, and the baulks have been moved

(1) 5 B. & C. 875. (2) 10 H. L. C. 593. (3) 8 A. & E. 314.

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from time to time according to its state; it is clear, therefore, that it is not a grant to use certain fixed baulks in particular places which ought to be presumed. It would seem that the grant must be presumed to have been in accordance with the nature of the river, and have been a grant to have the baulks in suitable places in the river. Can it be said that the fact that they were not used till 1844 within 100 yards of the stream,—when it is not shewn that there were then any places nearer which were suitable for fishing,—is any ground for presuming that the right to use these baulks was limited to places beyond that limit?

[WILLES, J. If the place where fixed engines had always been used became suddenly filled up by a deposit of mud, could they be moved to a more favourable place?]

No; but here the hollows seem to have been gradually shifting, and the baulks were shifted accordingly, and such a user does not amount to setting up new baulks, and points to a grant to use the baulks in the suitable hollows wherever they might be.

Sir J. B. Karslake, S. G., and *Hannen*, for the respondent. There are two questions in this case; first, whether there ever were any fixed engines legally in the river? and, if so, whether those now claimed are legal? It is admitted that those now claimed have only existed in the places where they now are since 1844, and that they have been moved thither only for the purpose of fishing more conveniently, for though the hollows may be the most convenient places, it would be possible to use the stake-nets even on the flat sands. Many statutes were passed prohibiting fixed engines in early times, partly as injurious to navigation, and partly on account of the injury they caused to the spawn. Magna Charta, c. 23, 25 Edw. 3, stat. 4, c. 4, 13 Ric. 2, c. 19, which referred specially to salmon fishery; 17 Ric. 2, c. 9, 1 Hen. 4, c. 12, 4 Hen. 4, c. 11, 12 Edw. 4, c. 7, are instances, and shew that, notwithstanding the prohibitions, persons kept putting up weirs, kiddles, &c. The result of those statutes is, that no stake-nets can be legal unless they actually existed at the time of Magna Charta, and if they were moved and set up in another place, those so newly set up would be illegal, as contrary to the statutes against the "enhancing of" such engines.

[WILLES, J. If the Crown had, before Magna Charta, granted a fishery with a right to put kiddles in various parts of it, what would have been the effect of the first statute against weirs, kiddles, &c., which excepted only those existing before the time of Edward I.? The grant of the Crown could not override the statute, and I presume it would have been illegal for the fishers to place kiddles anywhere except where they were at the time the statute was passed. If that be so, evidence of modern user of kiddles in varying places could not be evidence of the right to them, because there could be no legal grant, or, at least, no legal continuance of such a right.]

By 25 Edw. 3, stat. 4, c. 4, it is provided that all weirs, &c., that had been set up in the time of the King's grandfather, or afterwards, should be destroyed, and 45 Edw. 3, c. 2, imposes penalties on those who retain them, and provides that the like laws should hold of annoyance made by enhancing of such weirs, &c., as by the new levying of them. The case of *Weld* v. *Hornby* (1) shews that any material alteration of their character would be within the statutes: and still more would setting them up in a fresh place be so.

By 28 & 29 Vict. c. 121, s. 41, the commissioners are to state the place where the engines may lawfully be, which shews that the claim must be to place engines at certain fixed spots. [They also commented on the deeds and other evidence produced by the appellant.]

Mellish, in reply. The difficulty is to apply the law to a case in which the channel in which the stake-nets are placed gradually changes, especially when the change is caused by an erection made under an act of parliament expressly reserving the rights of the lords of manors. All several fisheries on the west coast seem to have been fished by stake-nets, and there is no doubt that this has been a several fishery from time immemorial. No question arises as to their interrupting navigation, for a certificate from the commissioners would afford no protection against an indictment if they are so. In fact, however, it has not been found by the commissioners that the river was navigable in the time of King John. The commissioners would sufficiently comply with 28 & 29 Vict. c. 121, s. 41, by describing the boundaries within which they were to be placed.

Cur. adv. vult.

(1) 7 East, 195.

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November 25. The judgment of the Court (Bovill, C.J., and Willes, J.), was delivered by

BOVILL, C.J. This case was argued last term, before my Brother Willes and myself, who were the only judges who heard the whole of the argument. I have now to deliver our judgment.

It was an appeal from a decision of the Special Commissioners for English Fisheries under the Salmon Fisheries Acts, by which they held that certain baulks or stake-nets which the appellant claimed to use in the estuary of the river Ribble were illegal.

The material question stated upon the special case for the judgment of this Court was, whether, on the evidence and facts as found, the commissioners were bound, as matter of law, to presume and to find that the baulks were privileged fixed engines, within the meaning of the Salmon Fisheries Acts.

The claim was originally made for four baulks or stake-nets; but, upon the argument, the appellant confined his case to three of the baulks, and which alone, therefore, are now in question.

From the form in which the question is submitted to us, it is not necessary to enter into a minute examination of the details of the evidence adduced before the commissioners. There was, no doubt, evidence well deserving their consideration: and if during all living memory the enjoyment of the right claimed had been uniform and unvarying, and consistent also with the ancient documents of title, we think the commissioners would have been bound to refer it to a legal origin, as, by grant, charter, or immemorial usage, if possible, and to have presumed that the three baulks in question were legal and privileged engines, within the meaning of the Salmon Fisheries Acts.

The difference in the situation of the baulks since 1844, however, at once introduces a difficulty in the way of the appellant, which is of the more importance in these cases, because, by the 41st section of the act of 1865, the commissioners are bound to fix the situation, size, and description of the engines which they are to certify as privileged. The use of the engines in the particular situations where they have existed of late years certainly could not be carried back earlier than the year 1844, and

this under the circumstances would not be sufficient to found the presumption of a right to have them at those particular places; and, if the right to have them in the situations where they had existed previously to 1844 was relied upon, the appellant was met by the fact that they had not been so used in those places during the open season of either of the five years 1857 to 1861, as required by the act of 1865.

In order to avoid these difficulties, the appellant's counsel was driven to contend that the appellant had proved a right to have *reasonable* engines in *reasonable places* with reference to the changing of the bed of the river, and that the commissioners were bound to make a presumption, and to find accordingly, in favour of such a right.

The utmost extent, however, to which that argument could in our opinion prevail, would be that the commissioners might be *at liberty* to presume such a right in the terms in which it was contended for by the appellant.

From the very nature of the evidence in other respects, depending upon the vague and general language of the more ancient documents, the deed of arrangement of 1757, the making and the effect of the artificial new embankment in 1844 (which might prevent the enjoyment of ancient rights without creating any new privileges), and from considerations arising from the ownership of the soil itself and a several fishery in half the river, and the changes in the course of the river taken in connection with the mode and places of using the baulks, and the varying situations and number of them, and which necessarily involved the question of whether there had been any enhancement of the baulks; we think the case was one essentially for the consideration and determination of the commissioners as a mixed question of fact and law, and not one where they were bound as matter of law to make the presumption in favour of the appellant; and certainly not in the terms for which he contends, viz. to have reasonable engines in reasonable places.

We need only add that the commissioners in these cases are bound to see that the right to privileged engines is satisfactorily made out by the party who claims to use them; and we do not wish to throw any doubt upon the correctness of the conclusion at

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which they have arrived in this instance, though this is not the question submitted for our judgment.

Our judgment is therefore in favour of the respondent.

Judgment for the respondent.

Attorneys for appellant: *Ridsdale & Craddock.*
Attorney for respondent: *The Solicitor to the Treasury.*

Nov. 30.

SHRIMPTON *v.* THE SIDMOUTH RAILWAY COMPANY.

*Company—Scire Facias—Discretion of the Court—*8 *Vict. c.* 16, *s.* 36.

6 C.B.N.S. 584. On an application by a judgment creditor of a company for a scire facias against a shareholder, under 8 Vict. c. 16, s. 36, the Court has a discretion as to allowing the writ to issue.

RULE calling on two shareholders in the Sidmouth Railway Company, named Ellis and Millington, to shew cause why a writ of scire facias should not be issued against them to enable the plaintiff to have execution against them on a judgment obtained by the plaintiff against the company.

The plaintiff's affidavits shewed that the plaintiff had obtained judgment for 1162*l.* 18*s.* 4*d.*; that there was no property of the company on which to levy the execution; and that Ellis and Millington were holders of shares in the company, which were not fully paid up.

Affidavits in answer had been filed on the part of Ellis and Millington, from which it appeared that the plaintiff was the contractor for the railway, and had been a shareholder in the company of more than 7000*l.* worth of shares, upon which nothing had been paid, and shortly before applying for this rule had transferred them all to a person living in a public lodging-house in Fetter Lane, who, they believed, was not a bonâ fide holder.

Holl shewed cause. The transfer of shares by the plaintiff was not bonâ fide, but only to free himself from liability in respect of them, and he must be treated, therefore, as being still the owner.

He has thus no right to proceed against other shareholders while he is himself indebted to the company in a far larger amount. The issue of the writ is a matter for the discretion of the Court, and, under the circumstances of this case, they will not give the plaintiff any aid in enforcing his claim.

The case of *Morisse* v. *Royal British Bank* (1), which will be relied on by the plaintiff, was decided on a different statute; the words of the present statute shew plainly that the Court can exercise a discretion in granting the writ; and in *Scott* v. *Uxbridge and Rickmansworth Railway Company* (2), the Court exercised its discretion and refused to allow the writ to issue.

Brown, Q.C., and *J. Philips*, in support of the rule. The Court has no discretion in this matter; but if the circumstances required by the act of parliament (8 Vict. c. 16, s. 36), are once shewn to exist, the plaintiff is entitled to a writ of scire facias as of right; this was decided in *Morisse* v. *Royal British Bank*. (1)

[BYLES, J. Does the Joint Stock Bank Act (3), on which that case was decided, contain similar words to those in the statute we are considering?]

The words are not the same; but the principle upon which that case was decided applies equally to the present statute. In *Macdougall* v. *Paterson* (4) it was held that the County Court Acts were imperative, though using the word "may," and that the Court could not refuse to allow the plaintiff his costs under the circumstances mentioned in the act; and *Crake* v. *Powell* (5), and *Reed* v. *Gardner* (6), are to the same effect. This Court cannot enter into the equities of the case, and decide upon the relative liabilities of the different shareholders, and if the plaintiff were treated as holder of the shares which he has transferred, the other shareholders would still be bound to contribute something towards his debt. If Ellis and Millington pay more under this writ of scire facias than is fairly due from them, the 37th section of the act (8 Vict. c. 16), affords to them a means of reimbursing themselves.

Cur. adv. vult.

(1) 1 C. B. (N.S.) 67; 26 L. J. (C.P.) 62.
(2) Law Rep. 1 C. P. 596.
(3) 7 & 8 Vict. c. 113, s. 13.
(4) 11 C. B. 755; 21 L. J. (C.P.) 27.
(5) 2 E. & B. 210; 21 L. J. (Q.B.) 183.
(6) 8 Ex. 651; 22 L. J. (Ex.) 253.

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June 4. The judgment of the Court (Bovill, C.J., Byles, Keating, and Montague Smith, JJ.), was delivered by

BOVILL, C.J. In this case we consider that we have a discretion, and that the circumstances shewn by the affidavits of the shareholders against whom it is proposed to issue the writ require explanation before the writ should be allowed to issue. As, however, the plaintiff has not yet filed affidavits in reply, we think that he should have an opportunity of doing so. The rule will, therefore, be enlarged, that the plaintiff may file affidavits in reply. The case of *Hardinge* v. *Webster* (1), shews plainly that Kindersley, V.C., thought that a court of law ought to inquire into circumstances such as those suggested in the present case, before allowing a writ of scire facias to issue.

Rule enlarged.

November 30. The plaintiff having filed affidavits in reply, explaining how he had obtained and dealt with the shares, the Court, after argument, made the rule absolute to issue a scire facias.

Rule absolute.

Attorneys for plaintiff: *Mackenzie & Trinder.*
Attorney for shareholders: *H. D. Ilderton.*

Nov. 13.

BECKETT *v.* THE MIDLAND RAILWAY COMPANY.

Railway Company—Compensation for Lands "injuriously affected," within the Lands Clauses Consolidation Act, 1845 (8 *Vict. c.* 18), *s.* 68, *and Railways Clauses Consolidation Act,* 1845 (8 *Vict. c.* 20), *ss.* 6, 16.

To entitle a claimant to compensation under the Lands Clauses Consolidation Act, and Railways Clauses Consolidation Act, 1845, he must shew that he has sustained a particular damage from the execution by the company of the works authorized by the special act, and that the damage is one for which he might have maintained an action if the work had not been authorized by parliament; and, further, that the injury of which he complains is an injury to his estate, and not a mere obstruction or inconvenience to him personally or to his trade, although it might have been the subject of an action if the works which occasioned it had not been executed under the sanction of parliament.

And the damage must be one which is sustained in respect of the property itself, and not in respect of any particular use to which it may from time to time be put.

(1) 1 Dr. & Sm. 101; 29 L. J. (Ch.) at p. 164.

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The plaintiff was possessed of a house fronting on a public highway. The defendants, a railway company, under the powers conferred upon them by their special act, erected an embankment on a portion of the highway opposite to the plaintiff's house, thereby narrowing the road from fifty to thirty-three feet, and thus, according to the evidence, materially diminishing the value of the house for selling or letting, and obstructing the access of light and air to it:—

Held, that this was such a permanent injury to the estate of the plaintiff in the premises as to entitle him to compensation under the Lands Clauses Consolidation Act, and Railways Clauses Consolidation Act, 1845.

Ricket v. *Metropolitan Railway Company* (Law Rep. 1 H. L. 175), observed upon and distinguished.

THE declaration is set out, Law Rep. 1 C. P. 241, where the Court gave judgment for the defendants on a demurrer to the second plea.

The first plea was that the messuage and the plaintiff's interest therein were not injuriously affected, within the meaning of the Lands Clauses Consolidation Act, 1845, by the execution of the defendants' works, nor was the plaintiff entitled to compensation. Issue thereon.

The cause was tried before Cockburn, C.J., at the last spring assizes at Bedford. The tenant of the house in question, which was situate in Ampthill Street, Bedford, stated that the road in front of the premises, which had formerly been fifty feet wide, had been narrowed by means of an embankment made by the defendants upon a portion of it to thirty-three feet; that the light to the lower room of the house had been thereby sensibly diminished; and that the narrowing of the road was a great discomfort, and occasioned inconvenience by reason of carriages being compelled to go some distance beyond the gate before they could turn. One Pulling, an auctioneer and surveyor, who knew the premises well, and who had acted for the sellers when the plaintiff bought the property, stated that he considered that the house was seriously damaged for occupation purposes by the embankment, and consequently depreciated in value by such embankment and also by the narrowing of the road; that it was reduced from a second to a third-class property; that whereas, before the erection of the company's works, the house was worth 30*l.* a year, he considered it now worth only 23*l.* a year; that in his opinion it was reduced from sixteen to twelve and a half years' purchase. This witness

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estimated the total depreciation of the premises at 192*l.* 10*s.*, one half of which he ascribed to the loss of prospect and to the house being overlooked from the embankment, and the remainder (96*l.* 5*s.*) to the contraction of the road and the diminution of light and air. Another witness (Edward Usher), an architect and surveyor, stated that in his judgment the letting and selling value was depreciated by the embankment and by the narrowing of the road, by reason of the impeded access of light and air and approach to the house.

A surveyor called on the part of the defendants denied that the access of light and air to the premises was seriously affected by the embankment, and stated that he saw nothing but the shutting out of the prospect and the overlooking which could tend to diminish the value of the premises; and that their value was not affected by the narrowing of the road (apart from the embankment), thirty-six to forty feet being a full width for a road in front of such a class of house.

His Lordship left it to the jury to say whether there had been any diminution of light or of air by reason of the embankment, or any diminution in the value of the plaintiff's house by reason of the contracting of the road in front of it.

The jury found in the affirmative on both questions, and a verdict was entered for the plaintiff for 80*l.*, the amount found by the award, subject to a motion.

O'Malley, Q.C., in Easter term, obtained a rule nisi to enter a verdict for the defendants, or a nonsuit, on the ground that there was no evidence of any injurious affecting, or of special damage whereby such injurious affecting could be caused, by narrowing of the road, irrespective of damage caused by the raising of the embankment.

Keane, Q.C., and *Douglas Brown*, shewed cause. At the trial the jury found that the access of light and air to the plaintiff's house was sensibly diminished by reason of the embankment, and that the value of his premises was affected by the narrowing of the road in front of them. The only question which is reserved to the Court is, whether there was any evidence to warrant the finding that the premises had been thereby injuriously affected, according

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to the judicial construction which has been put upon those words. The question is one upon which there has as yet been no judicial decision; for, the judgment of the House of Lords in *Ricket* v. *Metropolitan Railway Company* (1) turned mainly upon the absence of what is called structural damage, and the remoteness of the cause of action.

[WILLES, J. That is, that there must be some injury to the corpus of the property, and not merely an abridgment of the convenient user of it. *Ricket's Case* overrules *Wilkes* v. *Hungerford Market Company* (2), which had been decided in this Court eleven years before the passing of the 8 Vict. cc. 18, 20, and which must be assumed to have been in the minds of the legislature.

It must be conceded that that case is no longer law. But the question is whether property is not injuriously affected when its value is lessened. Railway companies are not like corporate bodies already existing. They are the creatures of the acts of parliament, and are subject to all the duties and penalties which the legislature has thought fit to impose upon them. If it had been intended that compensation should be paid only in those cases in which an action would have lain but for the authority given by the statute under which the works are being erected, it would have been so provided in terms. Before the passing of the railway acts, there were many wrongs for which there was a remedy by action as well as by indictment: the circumstance of the party aggrieved having a remedy by indictment did not necessarily deprive him of his right to resort to an action: Co. Litt. 56. a.; *Russell* v. *Men of Devon* (3); *Chichester* v. *Lethbridge* (4); *Rose* v. *Groves.* (5) Lord Cranworth, in *Ricket* v. *Metropolitan Railway Company* (6), speaking both of the 6th and 16th sections of the 8 Vict. c. 18, says: "Both principle and authority seem to me to shew that no case comes within the purview of the statute, unless where some damage has been occasioned to the land itself, in respect of which, but for the statute, the complaining party might have maintained an action. The injury must be actual injury to the land itself, as,

(1) Law Rep. 2 H. L. 175.
(2) 2 Bing. N. C. 281; 2 Scott, 446.
(3) 2 T. R. 667.
(4) Willes, 71.
(5) 5 M. & G. 613; 6 Scott (N. R.) 645.
(6) Law Rep. 2 H. L. at p. 198.

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by loosening the foundation of buildings on it, obstructing its light or its drains, making it inaccessible by lowering or raising the ground immediately in front of it, or by some such physical deterioration." The finding of the jury renders it unnecessary to consider the extent of the damnification in this case. It may be assumed that the defendants have incroached upon the entire road with the exception of a foot. Without going the extreme length of the judgment of Erle, C.J., in the Exchequer Chamber, in *Ricket* v. *Metropolitan Railway Company* (1), it is impossible to say that the plaintiff in this case has not sustained actionable damage. His house, though unchanged as to its site, is substantially altered as to its position, making it as Erle, C.J., observes, "less useful and agreeable to the occupier," reducing it from a second to a third-class house, and diminishing its rental from 30*l.* a year to 23*l.* The judgment of the Lord Chancellor in *Ricket* v. *Metropolitan Railway Company* (2) amounts in substance to this, that the damage which was the foundation of the claim made by the plaintiff for compensation was too remote to be the subject of an action. The rest was mere argument. Lord Westbury is the only one of the learned lords who has referred to any extent to what the legislature must have meant by the words "injuriously affected." His Lordship says (3): "It is material to observe that compensation under these statutes is given for damage resulting from lawful acts done by the companies in the exercise of their powers. Such acts are not injuries or grounds of action at law, although they may cause damage, and consequently give a right to compensation under the statute. When an act is done by a company in excess of its powers, or in a wanton and careless use of them, there is an injury for which the sufferer retains a remedy by an action at common law or by suit in equity for an injunction: but things done by a company in the due execution of its powers are lawful, being duly authorized, and no action lies on account of them. When, therefore, the general railway acts use the term 'injuriously affected,' the word 'injuriously' does not mean 'wrongfully' or 'unlawfully;' nor does it imply that compensation is limited to cases where the act done is such as but for the powers

(1) 5 B. & S. at pp. 165, 166; 34 L. J. (Q.B.) at pp. 261, 262.

(2) Law Rep. 2 H. L. at p. 188.

(3) Law Rep. 2 H. L. at p. 202.

given would be a tort at common law. The words mean 'damnously affected' only; and the consequential right to compensation is the creature of the statutes, to be ascertained and measured by the positive measure of the enactments, and not by analogy to actions of tort or trespass. There is nothing in the statutes to warrant the position that there shall be no compensation where at common law there would have been no right of action." In *Brand* v. *Hammersmith and City Railway Company* (1), it was held by the Exchequer Chamber, reversing the judgment of the Court of Queen's Bench (2), that the owner of a house, none of whose land has been taken for the purposes of the railway, is entitled to claim compensation against the company who constructed the railway (under ss. 6, 16, of the 8 Vict. c. 20), in respect of injury to the house (which, though not structural, depreciates its value,) caused by vibration, smoke, and noise in running locomotives by another company, with trains in the ordinary manner, after the construction of the railway. And in *Eagle* v. *Charing-Cross Railway Company* (3), diminution of light by reason of the execution of the works of the company was held to give a claim to compensation. *Caledonian Railway Company* v. *Ogilvy* (4), which will be relied on for the defendants, is distinguishable on the ground that the thing complained of was a mere inconvenience which Mr. Ogilvy sustained from the level crossing in common with all the rest of the Queen's subjects who had occasion to use the highway.

O'Malley, Q.C., Field, Q.C., Mundell, Q.C., and *Merewether,* in support of the rule. The 6th and 16th sections of the 8 Vict. c. 20, apply only to cases where lands are taken for the purposes of the railway, or are injuriously affected by its construction. The question in this case arises solely upon the construction of the 68th section of the 8 Vict. c. 18, which provides for the case of lands, no part of which are taken by the company, being "injuriously affected" by the execution of their works.

[BOVILL, C.J. The three acts, cc. 16, 18, 20, are all incorporated in the special act of the Midland Railway Company.

(1) Law Rep. 2 Q. B. 223. This case is about to come before the House of Lords.

(2) Law Rep. 1 Q. B. 130.

(3) Law Rep. 2 C. P. 638.

(4) 2 Macq. 229.

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The Lord Chancellor and Lord Cranworth, in *Ricket* v. *Metropolitan Railway Company* (1) refer especially to the 16th section of the Railways Clauses Consolidation Act.

KEATING, J. I look upon the 68th section of the Lands Clauses Consolidation Act as procedure only.]

It may be that for the purposes of this argument there is no material distinction between the two statutes. The real question is, whether there is any evidence that the plaintiff's premises have been injuriously affected, within the construction which the recent decisions have put upon those words. It is submitted that they have not. The damage for which compensation is claimed must be one in respect of which the claimant might have maintained an action against the company if their works were unauthorized by an act of parliament: *Glover* v. *North Staffordshire Railway Company* (2); *Ricket* v. *Metropolitan Railway Company*. (3) The company, having a right under their special act to incroach upon a highway in the neighbourhood of Bedford, erected an embankment which covered the road opposite the plaintiff's house to the extent of about seventeen feet of its width. To entitle him to claim compensation for that, the plaintiff must not only shew an actionable damage, but a damage which is actionable by reason of an injury done to *land*. That distinction was first taken in *Caledonian Railway Company* v. *Ogilvy*. (4) There, the company interfered with the access to the claimant's house by a level crossing on the highway: and it was held that that, being an inconvenience to which all the Queen's subjects were exposed, was not a ground for compensation under the acts. Here, the complaint is that the plaintiff's access to his house is rendered less convenient by the narrowing of the road by means of the embankment.

[BOVILL, C. J. And also that his house is reduced as to its class, and would consequently let for a lower rent.]

That was the surveyor's opinion only. The house in *Ogilvy's Case* would probably command a lower rent in consequence of the obstruction.

[BYLES, J. According to the decision of the House of Lords, Mr. Ogilvy would have had no compensation if a railway had

(1) Law Rep. 2 H. L. 194, 197, 198.
(2) 16 Q.B. 912; 20 L. J. (Q.B.) 376.
(3) Law Rep. 2 H. L. 175.
(4) 2 Macq. 229.

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crossed the highway which gave him access to his house, both to the right and to the left.]

In *Ricket's Case* (1), the obstruction was so near to the plaintiff's house that customers were prevented from going there for refreshment with the same facility as before; and the saleable value was materially diminished. The judgment of Erle, C.J., in the Exchequer Chamber (2) rests mainly upon the case of *Chamberlain* v. *West of London and Crystal Palace Railway Company* (3), which is altogether distinguishable from the present case. There it was expressly found that there was the kind of special and particular injury which the law requires: the claimant's private access to a public road was obstructed. The case of *Baker* v. *Moore*, cited by Gould, J., in *Iveson* v. *Moore* (4), must, like *Wilkes* v. *Hungerford Market Company* (5), be taken to have been overruled by *Ricket* v. *Metropolitan Railway Company.* (1)

BOVILL, C.J. This case depends on the 6th and 16th sections of the Railways Clauses Consolidation Act, 1845 (8 Vict. c. 20), and the 68th section of the Lands Clauses Consolidation Act, 1845 (8 Vict. c. 18), and must be governed by the construction placed upon these enactments by the House of Lords, in the recent case of *Ricket* v. *Metropolitan Railway Company.* (1)

By the 6th section of the Railways Clauses Consolidation Act, the company are to make to the owners and occupiers and all other parties interested in any lands taken or used for the purpose of the railway, or injuriously affected by the construction thereof, full compensation for the value of the land so taken or used, and for all damage sustained by such owners, occupiers, and other parties by reason of the exercise, as regards such lands, of the powers by that or the special act, or any act incorporated therewith, vested in the company. By the 16th section, powers are given to interfere with roads, watercourses, and lands, and other powers are given of a very extensive description, all of which have

(1) Law Rep. 2 H. L. 175.
(2) 5 B. & S. 156; 34 L. J. (Q.B.) 257 (1) 12 Mod. 262; Carth. 451.
(3) 2 B. & S. 605; 31 L. J. (Q.B.) (5) 2 Bing. N. C. 281; 2 Scott, 201; in error, 2 B. & S. 617; 32 L. J. (Q.B.) 173.
(4) 1 Ld. Raym. 486; Com. 58;

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been found necessary in the construction of railways. Then the clause, which is commonly called "the working clause," is subject to this proviso, viz. that, in the exercise of the powers given to the company, they shall do as little damage as can be, and shall make full satisfaction to all parties interested, for all damage by them sustained by reason of the exercise of such powers.

Thus the railway company, by virtue of their special statutes, and by virtue of the general acts consolidated with them, have extensive powers of interfering, not only with private property, but with public rights and public roads and highways; the whole being subject to the provisions to which I have called attention.

The 68th section of the Lands Clauses Consolidation Act provides that "if any party shall be entitled to any compensation in respect of any lands or any interest therein which shall have been taken for or injuriously affected by the execution of the works, and for which the promoters of the undertaking shall not have made satisfaction," a certain remedy may be adopted.

A distinction was at one time sought to be made, as I understood, by Mr. Field, between the 68th section of the Lands Clauses Consolidation Act and the 6th and 16th sections of the Railways Clauses Consolidation Act; but in reality there is no distinction that could properly be made. The first-mentioned section refers to the mode of enforcing the right to compensation; the right to which is, as it seems to me, governed by the two sections of the last-mentioned act to which I have adverted.

Now, the question arises whether the plaintiff's house in this case was "injuriously affected,"—which is the expression used in the 68th section of the Lands Clauses Consolidation Act,—and whether there is damage sustained by the plaintiff as regards his house by reason of the exercise of the powers of the company, according to the 6th section of the Railways Clauses Consolidation Act, and whether there is damage sustained by the plaintiff by reason of the exercise of the powers given to the company according to the language of the 16th section of the same act.

With respect to damage done to the house, the jury have found that there was damage, that the house itself was injuriously affected; and, having found that, the extent to which the house was injuriously affected was not for them, because that was already

settled by another tribunal, viz. the arbitrator who had to assess the amount. The only question in the case was whether the house was injuriously affected, within the meaning of the acts of parliament,—whether there was evidence, in fact, to entitle the jury to come to that conclusion. We have not now to deal with any contradictory evidence: nor have we to deal with any supposed misdirection of the learned judge. The direction being right, it must be assumed that the jury were instructed to find and that they did find their verdict only upon that evidence which was properly before them; and no complaint can now be made of the reception of any evidence. The only question raised before us, and the only question which is open to the defendants upon the evidence as it appears on the learned judge's notes, is, whether there was any evidence that was proper to be left to the jury of the plaintiff's house being injuriously affected, within the meaning of the act of parliament, and, upon that inquiry, and for the purpose of the present rule, is limited to whether there was any evidence of its having been injuriously affected, within the meaning of the statute, by the narrowing of the road. All the other questions are entirely beside the point which has now to be decided.

The evidence as to the narrowing of the road is extremely short. It is not necessary to refer to the contradictory evidence, because it must be taken that the jury have given effect to that which was proved on the part of the plaintiff: and, they having found that the house was injuriously affected, if there was any evidence which was proper for their consideration, the verdict must stand; and that must also depend in some degree upon the construction to be placed upon the language of the act of parliament. The plaintiff's tenant, who gave evidence upon this point, stated that the road had formerly been fifty feet wide, but was now only thirty-three feet; that the narrowing of the road was a great discomfort to him; that omnibuses coming to set down passengers at his house had to go some distance further, where the road was wider, in order to turn; and that, on one occasion, the conductor had asked him to alight three doors off, by reason of the difficulty of turning. Mr. Pulling, the surveyor and auctioneer who had acted for the seller when the plaintiff purchased the house, on this part of the case stated that he considered that the value of the premises was diminished by

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the narrowing of the road, to the extent of reducing them from a second to a third-class property; and that, whereas, before the alteration, the house was worth 30*l.* a year, it was now only worth 23*l.* a year; that its saleable value was reduced from sixteen to twelve years' purchase; and that he estimated the total depreciation at 192*l.* 10*s.*, one half of which he ascribed to the house being overlooked by reason of the embankment, the other to the contraction of the roadway and the diminution of light and air. Mr. Usher, an architect and surveyor, also spoke to the contraction of the road and the consequent depreciation in value of the plaintiff's premises. One of the defendants' witnesses (Bowdler) also stated that the proper width of road opposite a house of the class of the plaintiff's house was from thirty-five to forty feet. This evidence was left to the jury; and the question put to them was, whether there was any diminution in the value of the house by reason of the contraction of the road in the front of it. Upon that question the jury found their verdict in the affirmative. It seems to me that it was entirely a question of fact for the jury whether the house was or was not damaged; and that we must now take it that the house and the plaintiff's interest therein were permanently and injuriously affected. I am also of opinion that, but for the act of parliament which authorized the making of the railway and the narrowing of the road, an action might have been maintained by the plaintiff for such injury, and that he is entitled to claim compensation under the provisions of the acts I have referred to. The injury complained of is not of a temporary character, as in *Ricket* v. *Metropolitan Railway Company* (1), but is of a permanent nature, if the property was affected at all by the abstraction of a portion of the road which formed the access to the house. In *Ricket's Case* (1) the compensation was claimed in respect of a mere temporary obstruction and interruption to the business of the plaintiff. For that the House of Lords held that he was not entitled to maintain an action or to claim compensation. That is a totally different case from this, where the injury is permanent, and the plaintiff's premises are found by the jury to be diminished in value quite irrespective of the particular person and of the trade carried on. It is not necessary that the claimant's house should be actually

(1) Law Rep. 2 H. L. 175.

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touched or interfered with, to entitle him to claim compensation under the acts: a substantial interference with the enjoyment of light and air affords a ground of action or of claim for compensation. (1) If the claimant's right of access from or to the highway was taken away, nobody would doubt that he would be entitled to compensation. These are injuries to the particular individual quite apart from any that may be sustained by the public at large. If the entire destruction of the claimant's access by raising or lowering or diverting the road gives a cause of action or a right to compensation, I am at a loss to understand upon what principle it can be contended that the obstruction of a substantial part of it does not give the same right of action and compensation. In the one case, the premises would be of no value; in the other, their value would be substantially diminished. It is only a question of degree. A very slight detraction from the width of a road, like a slight obstruction of light and air, might occasion no damage or injury. This, as it seems to me, is quite in accordance with the law as laid down by the Court of Queen's Bench in *Reg.* v. *Eastern Counties Railway Company* (2), and in *Chamberlain* v. *Crystal Palace Railway Company* (3), and also with the view of Erle, C.J., in delivering the judgment of the Exchequer Chamber in *Ricket* v. *Metropolitan Railway Company* (4) and the decision of the House of Lords in the same case.

The case of *Caledonian Railway Company* v. *Ogilvy* (5) has been much pressed upon our attention, and must, it is said, govern our decision here. It was there held that an interference with a public road by crossing it on the level gave a private individual no claim against the company. The obstruction there was one which occasioned a general inconvenience to all her Majesty's subjects. The facts do not very clearly appear in the report; but the decision evidently proceeded on the ground that no particular damage or inconvenience was sustained by the claimant beyond that which was suffered by the general public. At p. 250 of the report, Lord St. Leonards says: "I can see nothing by which this gentleman

(1) *Eagle* v. *Charing-Cross Railway Company*, Law Rep. 2 C. P. 638.
(2) 2 Q. B. 347.
(3) 2 B. & S. 605; 31 L. J. (Q.B.) 201; in error, 2 B. & S. 617; 32 L. J. (Q.B.) 173.
(4) 5 B. & S. 161.
(5) 2 Macq. 229.

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would sustain damage beyond what everybody else sustains. His estate is not damaged." In the present case the plaintiff's estate was found by the jury to have sustained damage: the damages are assessed, not by reason of any matter merely personal to the plaintiff; but the house itself was damaged. The opinion expressed by the Lord Chancellor (Lord Cranworth) is pretty much to the same effect. This case is therefore clearly distinguishable from *Ogilvy's Case*. (1) I think the plaintiff is entitled to retain the verdict.

WILLES, J. I am of the same opinion. Whatever difficulties may have arisen in other cases, this appears to me to be a perfectly plain one. To entitle a claimant to compensation under the Lands Clauses Consolidation Act, 1845, two things must concur, viz. that he has sustained a particular damage from the execution by the company of the works authorized by the special act, and that the damage was one for which he might have maintained an action if the work was not authorized by parliament. To these propositions everybody will now assent, notwithstanding some observations of the very able and learned lords in *Ricket* v. *Metropolitan Railway Company* (2) which would seem to throw some doubt upon the latter of them. Then there is a third point which, looking to the language of the acts of parliament, it is obvious that the claimant must establish, viz. that the injury he complains of was an injury to his estate, and not a mere obstruction or inconvenience to him personally or to his trade, although it might have been the subject of an action if the works which occasioned it had not been executed under the sanction of parliament. To these propositions the judgment of the House of Lords in the case last referred to has added another, which must be taken to be equally clear, and which we are bound to assent to and to act upon, and one which I cheerfully accept upon such high authority, and upon which I shall act to the best of my ability; and that is, that the damage complained of must be one which is sustained in respect of the ownership of the property,—in respect of the property itself, and not in respect of any particular use to which it may from time to time be put: in other words, it must, as I read that judgment, be a damage which

(1) 2 Macq. 229. (2) Law Rep. 2 H. L. 175.

would be sustained by any person who was the owner, to whatever use he might think proper to put the property. Now that, of course, is to be taken with the limitation that a person who owns a house is not to be expected to pull it down in order to use the land for agricultural purposes. That would be pushing the judgment in *Ricket* v. *Metropolitan Railway Company* (1) to an absurd extent. The property is to be taken in statu quo, and to be considered with reference to the use to which any owner might put it in its then condition, that is, as a house.

Now, here at once arises a question, which if answered in one way it would be useless to proceed further with the discussion. Does *Ricket's Case* (1) apply to any damage which may have been sustained in this case? I shall presently consider whether any damage was sustained; but I must assume for the present that there was damage. If, then, the damage was sustained, it was in respect of the house becoming worth less to sell or to let. Is that a damage in respect of some particular use of the premises to which they might be put by one occupant, but to which they would not be put by another? Is it a damage in respect of loss of custom or of goodwill, such as was rejected by the House of Lords in *Ricket's Case*? (1) or is it a damage in respect of the property itself? It is a damage which is sustained by any person who may be the owner of the property, and may wish to be in possession of it. Now, it must be admittted that there is great force in the remarks of one of the noble lords in *Ogilvy's Case* (2), on which my Lord Chief Justice has observed, as applied to a case in which there is no absolute diminution in the value of the property,—in which it cannot be affirmed that the property will sell for less in the market by a given sum, or that it will attract fewer tenants or let for a less rent. Those remarks appear to me to have no application to a case where the estate itself is diminished in value; for, when you talk of damage to an estate, you equally damage it whether you cut off an angle of it which may be the least desirable to a purchaser, or take away from it a substantial advantage in respect of which it will fetch less in the market than it would have done with that advantage. It would be almost pedantic to refer to that which every one can glean for himself from the opinions of

(1) Law Rep. 2 H. L. 175. (2) 2 Macq. at p. 250.

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writers on the principles of the law, that property cannot be regarded, in respect of its value, as a thing standing abstractive of ownership, but must be regarded in a juridical relation, as being a sort of extension of the power of the owner. But, if I have an estate lying waste, and without any intention of making any use of it, that would be a thing of no value, and in respect of which no damage could be sustained. Here, however, damage is sustained by the estate in the sense that it would sell or let for less; and that is a damage to which it is subject in the hands of any owner who may from time to time possess it. I should have thought, therefore, taking that third proposition as established by *Ricket's Case* (1), and excluding all notion of mere temporary user of the property, that there was damage in respect of the estate; and I think I might even venture to challenge the ingenuity of the learned counsel whose argument we have had the advantage of hearing on the part of the defendants, first to shew that the diminution of value is not a damage, and secondly, if it be one, that it is not a damage to the estate, in the sense in which that language was used in *Ricket's Case.* (1) I should have thought that nothing was left to be done now but to consider the character of the damage, for the purpose of shewing that it was within the act of parliament; because, at the time the act was passed, there were decisions in existence which would give to its language a very much wider application than since *Ricket's Case* (1) we are at liberty to give to it. There was the decision of *Wilkes* v. *Hungerford Market Company* (2),—a case decided in the year 1835, some ten or eleven years before the passing of the act upon which the question arises, by judges of great eminence, after being argued by counsel who were not likely to submit to such a construction if they were not satisfied with the reasoning of the Court, and acted upon from time to time not only by the profession without objection, but also acted upon by the legislature not introducing any measure to exclude the application of that authority, up to the recent period at which the doubts were thrown out which brought forth the result displayed in the report of *Ricket's Case* (1), by which it is established that a person injured in respect of goodwill has no right of action. But I do not think that it is possible,

(1) Law Rep. 2 H. L. 175. (2) 2 Bing. N. C. 281.

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indeed it would be perfunctory after the laborious discussions which the authorities received in *Ricket's Case* (1), to stop short at what to my mind appears to be conclusive reasoning tending in its result in favour of the plaintiff in this case; and I shall say one word, therefore, on each of the points to which attention has been called, with reference to those sources from which we are accustomed to draw our legal convictions.

First of all, then, there must be a damage. Now it would, I think, be a play upon words,—to adopt the expression used by Lord Cranworth in *Ogilvy's Case* (2),—to say that there was no damage here. It must be conceded that there was a damage to the owner of the house from the narrowing of the road in front of it. It is not worth so much to sell or let as it was before. I will not cite authorities upon a matter which is so plain.

With regard to the second proposition which the claimant has to establish, viz. that there was that which would have been an actionable wrong but for the statute, it may be desirable to say a word; because these questions are likely to occur, and they attract a good deal of attention, and the parties are entitled to have our opinion, with the grounds upon which that opinion rests. Now, was there an actionable wrong here? We are accustomed to go back for the definition of a right of action, to, amongst other books, Comyns's Digest, Action upon the Case (A), where it is laid down, that, "in all cases where a man has a temporary loss or damage by the wrong of another, he may have an action upon the case, to be repaired in damages." That, it may be said, is a truism; but it is well to bear in mind elementary propositions. The illustration which immediately follows is that for which I cite this passage:—"As, if A. has a colliery, and B. stops up a highway near it, whereby nothing can pass to such colliery, an action upon the case lies, for he ought to be remedied in particular, though it was a highway for all." The authority referred to by Chief Baron Comyns in support of that proposition is the case of *Iveson* v. *Moore*. (3) In a subsequent part of the same work, viz. Action upon the Case for a Nuisance (C), after stating the necessity for

(1) Law Rep. 2 H. L. 175.
(2) 2 Macq. at p. 236.
(3) Ld. Raym. 486; 1 Salk. 15; Holt, 10; Com. 58; 12 Mod. 262; Carth. 451; Comb. 480; Willes, 74, n.

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special damage, to entitle an individual to maintain an action, the learned Chief Baron proceeds,—"If by stopping the highway a man is constrained to use a longer or more difficult way, or if by stopping the way the sale of his coal is hindered in an adjacent colliery; à fortiori, if by the obstruction the sale of his coals is diminished." These propositions rest, no doubt, to a very great extent, upon the case of *Iveson* v. *Moore* (1); and therefore it will be well to see what that case really was. It was cited by Mr. Mundell for the opinion of Holt, C.J., an opinion to which I should be prepared to bow as much as to the opinion of any judge who ever sat on the bench; but an opinion in this particular case which, as the opinions of the best man sometimes turn out to be, appears to have been thought erroneous by all the other judges except one,—those judges having the sanction of the opinion of Lord Chief Baron Comyns in favour of their view. It was an action, as shortly stated by Comyns, by a person who had a coal-pit; and the highway which led to that pit was obstructed. He brought his action, stating that obstruction, and shewing what the Court sufficiently had before them, that customers were thereby prevented from coming to his pit. There was a formal objection that the names of the customers were not stated; and other points arose which it is not necessary to refer to: but it must be taken that all the Court answered that the declaration sufficiently alleged that there was an obstruction of the way, that it was a highway, and that by that obstruction custom was lost to the pit. Coal was injured by reason of the delay; and it was suggested that that constituted a cause of action: and Holt, C.J., who appears to have been the only judge who gave an opinion upon the point (2) thought that, if the declaration had shewn that the colliery was damaged by reason of the delay, there would have been a good cause of action if it had been laid that the coals which the plaintiff had ready for sale were damaged or lost because he could not carry them off. There is the strongest ground for saying that the depreciation of value of the property, though movable as the coals were in the case supposed by Holt, would in his opinion have been an actionable injury; but, the declaration being taken

(1) 1 Ld. Raym. 486; 1 Salk. 15; Carth. 451; Comb. 480; Willes, 74, n. Holt, 10; Com. 58; 12 Mod. 262; (2) Carth. 453.

simply to allege loss of custom, two of the judges, Lord Chief Justice Holt, and Rokeby, J., were of opinion that the action was not maintainable, and the other two judges, Turton and Gould, JJ., were of opinion that it was; upon which the old practice of adjourning matters into the Exchequer Chamber, for difficulty, being then in vogue, the matter was adjourned before the judges of the Common Pleas and the barons of the Exchequer; and it appears from the note in Willes, p. 74, that they all agreed in the opinion of Turton and Gould, JJ., that the action lay. The reason the judges went upon was principally this, "that it sufficiently appeared that the plaintiff must and did necessarily suffer a special damage more than the rest of the King's subjects by the obstruction of this way, because it was set forth that the only way to come to the coal-pit from one part of the country was through this way, by which it must be understood, without any allegation of loss of customers, that the plaintiff did suffer particularly in respect of his trade by the defendant's wrong. That was the case of *Iveson* v. *Moore*. (1) It was followed by the case first referred to by Chief Baron Comyns in Action upon the Case for a Nuisance (C), *Chichester* v. *Lethbridge* (2), cited for the plaintiff. It was there held that the stopping up of a way, and substituting a longer and more difficult way, was in itself such a special damage as to give a cause of action.

Now, as to the decision of the House of Lords in *Ricket* v. *Metropolitan Railway Company* (3), let it not for a moment be supposed that I am casting any reflection on the expressions of the learned lords when I refer at large to that case. I treat them as of great importance, and look to them most unfeignedly for information as to what is the law there laid down, and to see within what limits it is competent for me to act upon my own judgment. Remarks were there made not only upon the case of *Wilkes* v. *Hungerford Market Company* (4), but also upon the case referred to by Gould, J., in *Iveson* v. *Moore*, viz. *Baker* v. *Moore*. (5) This latter was the case of a highway being stopped up, whereby the plaintiff's

(1) 1 Ld. Raym. 486; 1 Salk. 15; Holt, 10; Com. 58; 12 Mod. 262; Carth. 451; Comb. 480; Willes, 74, n.

(2) Willes, 71.

(3) Law Rep. 2 H. L. 175.

(4) 2 Bing. N. C. 281.

(5) 1 Ld. Raym. 495, n.

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tenants (possibly tenants for short periods, who had power to do so) were induced to quit, per quod the plaintiff lost the profit of his houses; and the whole Court was of opinion that this damage was special enough. But for the observations of the learned and noble lords upon that case, I should have thought that the stopping up a highway, whereby tenants who had a right to quit, by reason of the inconvenience they were exposed to did quit, was a wrong so specially and particularly affecting the owner of the houses as to give him a cause of action for the damage resulting to him from the wrongful act of the defendant. And I do not now know upon what ground it was that Lord Chelmsford, C., said that the case of *Baker* v. *Moore* (1) appeared to him to be even more doubtful than that of *Wilkes* v. *Hungerford Market Company* (2), which latter was unquestionably overruled in *Ricket's Case.* (3)

I have carefully studied that judgment. I do not know whether it was a written judgment or only taken down by the reporter as delivered orally by the noble lord (4): but I cannot make out whether the objection to the action in the case of *Baker* v. *Moore* (1) was that the action would not lie in respect of the injury, or that it was not sustainable on the ground of the remoteness of the damage. Speaking with profound deference to the remarks of that noble and learned lord, I think I may well doubt that *Baker* v. *Moore* (1) must necessarily share the fate of *Wilkes* v. *Hungerford Market Company* (2), because in the latter case there was that which existed in the case under judgment, viz. a claim for compensation in respect of loss of goodwill; whereas, in *Baker* v. *Moore* (1), the claim was in respect of actual damage by deprivation of the only use to which the plaintiff could put his houses,—a loss, therefore, directly affecting the ownership of the houses, and a loss moreover of a character which has in other cases besides that of *Baker* v. *Moore* (1), as well before as since, been held sufficient to constitute special damage, so as to sustain an action in which it is necessary to aver and to prove such special and particular damage. I cannot at this moment cite an instance in respect of a highway; but I can refer to a case which is clearly analagous, in which it was held that the loss of

(1) 1 Ld. Raym. 495, n.
(2) 2 Bing. N. C. 281.
(3) Law Rep. 2 H. L. 188.
(4) It was in fact written.

tenants by a wrongful act was not only sufficiently proximate, but also constituted a sufficient special damage to give to a person who otherwise could not sue in respect of the alleged wrong, a complete cause of action. Take the case of an obstruction of a private way, the dominant tenement being occupied by a tenant, —could the reversioner maintain an action for the obstruction? The answer to that question is that he can if the injury be of such a permanent character as to cause him damage. Now, what is the law with respect to reversioners suing? I shall not refer again to Comyns's Digest, because the matter has been considered in a very recent case in this Court, to which I believe the attention of the House of Lords was not drawn in reference to the authority of *Baker* v. *Moore*. (1) Possibly there was no opportunity of doing so; or it may be that counsel may have thought it superfluous to refer to authorities on the subject, and the matter may have passed without much observation, and so the distinction between *Baker* v. *Moore* (1), and *Wilkes* v. *Hungerford Market Company* (2), may have been lost sight of. The case I refer to is *Bell* v. *Midland Railway Company*. (3) By a particular section of the act of incorporation of the company, the owners of lands adjoining the line were empowered to lay down or extend either upon their own lands or on lands on the side thereof belonging to the company, or upon the lands of any other persons, with the consent of such other persons, any collateral or continuous branch from such respective lands, &c., to communicate with the railway, for the purposes of bringing carriages upon or across the same. The plaintiff, in 1839, with the assent of the company, made a siding on his land connecting the railway with a wharf, part of which was in his own occupation and other part in that of certain tenants; and down to the year 1857 the company carried coals and other goods for the plaintiff and his tenants, placing the trucks on the siding, and so sending them down to the wharf. In the course of that year, however, the company (with a view, as the jury thought, of diverting the trade from the plaintiff's wharf to another wharf in which they were interested,) gave the plaintiff notice, under another section of their act, that, after the 30th of

(1) 1 Ld. Raym. 495, n. (2) 2 Bing. N.C. 281.
(3) 10 C. B. (N.S.) 287.

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September, they would no longer provide him with locomotive power for the conveyance of his goods along their line; and on the 1st of October they placed carriages and other things across the junction, for the purpose (as the jury found) of permanently obstructing and preventing the plaintiff and his tenants having access to the wharf by means of their railway. Neither the plaintiff nor his tenants had availed themselves at this time of the authority given to them by the act of parliament, to provide locomotive power of their own, and consequently they were not in a position to be *actually* obstructed. The tenants, however, finding their trade destroyed, removed from the plaintiff's wharf, and carried their business to the company's wharf. And this Court held that these wrongful acts of the company constituted such a permanent obstruction and injury to the plaintiff's right to the use of his siding as to entitle him as reversioner to maintain an action. For the portions of the wharf occupied by the plaintiff's two tenants, the plaintiff was to be paid a certain royalty on coals sold, —the minimum royalty to be paid by one being 200*l.* per annum, and by the other 180*l.*; and the plaintiff was, at the time of the obstruction complained of, in treaty with a third person for letting him the remaining portion of the wharf at 300*l.* per annum. And it was held that the jury were warranted in taking these sums into their consideration in estimating the amount of damage the plaintiff has sustained. A great number of authorities were marshalled before the Court in that case, for the purpose of shewing that the loss of tenants by reason of the wrongful act of the defendants might be such a damage as might be sued for by the party injured. These cases are chiefly collected in Comyns's Digest, Action upon the Case for Disturbance (A. 6), and Action upon the Case for Misfeasance (A. 6). One or more of them has been reflected upon with reference to the right to maintain the action, and with reference to its being necessary to shew the intention; but none of them with reference to the immediate character of the damage, or with reference to the damage being sufficiently proximate to be taken into account. Speaking, therefore, of the case of *Baker* v. *Moore* (1), I would say with the greatest deference that it deserves to be well considered before it is treated as overruled

(1) 1 Ld. Raym. 195, n.

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by the dictum I have referred to in *Ricket's Case.* (1) For the reasons I have given, I think it is not on all fours with, or indeed in the same category as *Wilkes* v. *Hungerford Market Company* (2) and *Ricket's Case.* (1) It will be necessary to refer to other branches of the law, which will be very seriously disturbed if it is not treated as an authority. The apparent character of the work done seems to me to furnish another and a conclusive reason for holding that here was a sufficient cause of action and sufficient damage. The road has been permanently narrowed. We are not to imagine the possibility of the railway being abandoned, and the road restored to its original state. Indeed, by the mere fact of the embankment being made on it, the road is pro tanto destroyed by act of parliament. We must, therefore, assume that the obstruction complained of will continue until the end of time.

Now, let me consider the case in that point of view, with reference both to the cause of action and to the damage. And here I will content myself by repeating an illustration which I put to Mr. Mundell in the course of his argument, but which he disposed of by contradicting the hypothesis on which it was founded,—a logical process the correctness of which it is unnecessary to dispute at length. It is not easy to think of a case in which, apart from an act of parliament and work done under it, a road is either abolished or permanently interfered with because there is always the remedy by indictment, resulting, in the event of a conviction, in a writ to abate the nuisance, and therefore presumably the obstruction is not a permanent or perpetual one. In *Baker* v. *Moore* (3) and *Iveson* v. *Moore* (4), and also in *Ricket* v. *Metropolitan Railway Company* (1), the obstruction was temporary only. Suppose the case of a man possessed of a house at a watering-place, which he lets to visitors during the season, there being a carriage-road between the house and the cliff, the soil of which is vested, not in the owner of the house, but say in the lord of the manor under an Inclosure Act, and a third person wrongfully narrows the road so that the house can no longer be approached by carriages, and the house in consequence

(1) Law Rep. 2 H. L. 175.
(2) 2 Bing. N. C. 281.
(3) 1 Ld. Raym. 495, n.
(4) 1 Ld. Raym. 486; 1 Salk. 15; Holt. 10; Com. 58; 12 Mod. 262; Carth. 451; Comb. 480; Willes, 74, n.

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will not let for so much as it did before,—would not that be such a damage to the house and to the owner's interest therein as to entitle him to maintain an action against the wrongdoer? I think it clearly would be.

Now, there is only one further remark that I should wish to make; and that is with reference to two cases which have been cited. I omit referring to those cases which do not appear to me to have a direct and immediate bearing upon the question such as I understand it, and such as I have endeavoured to portray it. Those cases are *Caledonian Railway Company* v. *Ogilvy* (1) and *Chamberlain* v. *West End of London and Crystal Palace Railway Company*. (2) As to the former, I think it has been disposed of by my Lord. In the first place, there was no permanent taking away of the road, but a mere occasional obstruction on the passing of a train, to the temporary inconvenience of those who wished to use the road. The noble lords there held that the estate was not damaged; or, at all events, the injury to the estate, if any, formed no element in the judgment of the House. Here, the jury, upon evidence which was properly presented to them, and which warranted their conclusion, have found that the plaintiff's estate in the house was actually damaged.

I shall conclude with a word upon *Chamberlain's Case*. (2) It is well known that the late respected Chief Justice of this Court took a very decided view on the subject of the liability of railway companies to make compensation. It is notorious that very large sums were formerly assessed for what in many cases were in reality mere imaginary injuries. On one occasion, a very large amount which had been received for compensation for supposed injury to the estate of a well-known gentleman, was returned by him to the company, because it turned out that the works of the company, instead of injuring, had vastly enhanced the value of his property. In the judgment of that learned judge in *Ricket* v. *Metropolitan Railway Company* (3), in the Exchequer Chamber, speaking of *Chamberlain's Case* (2), he says: "The frontage had been to a wide, well-frequented road, leading to and from important towns. By the execution of the railway

(1) 2 Macq. 229.

(2) 2 B. & S. 605; 31 L. J. (Q.B.) 201; in error, 2 B. & S. 617; 32 L. J. (Q.B.) 173.

(3) 5 B. & S. 161.

works, it was made to front to a dumb alley sunk below the level of the substituted thoroughfare over a railway bridge, along which the stream of passengers would be compelled to flow. Frontage gives value to building-ground; therefore the railway company took away valuable frontage, and substituted that which was fictitious; and therefore it was held that they had there taken the house both in its frontage and in its access to and from the effective thoroughfare of the locality." The present case appears to me to be a perfectly plain one, and to be left quite untouched by the authorities referred to on behalf of the defendants. I therefore think the rule should be discharged.

BYLES, J. But for the decision of the House of Lords in *Ricket* v. *Metropolitan Railway Company*, I should have felt less difficulty in deciding in favour of the plaintiff in this case. That decision, however, is binding upon us; and our judgment, if inconsistent therewith, must be erroneous. I say with the judgment of the House in that case; for, it has repeatedly been observed that all that falls from the noble and learned lords is not necessarily authority; and that must be so à fortiori where, as in *Ricket* v. *Metropolitan Railway Company* (1), there is a difference of opinion amongst those learned and noble persons. Confining myself, therefore, to a comparison of the facts and circumstances of the two cases, it appears to me that the case before us is distinguishable from that case in several material particulars. First, the injury here is permanent; there it was temporary, like a hoarding, which, though an incroachment upon the public footway, if it be not wider than necessary, or kept up longer than necessary, may not be a nuisance. Secondly, the damage here is direct as affecting the property of the plaintiff; there, the injury was indirect, and an injury to the trade only, and therefore the House of Lords felt the difficulty of distinguishing the case before them from that of the post-master at some distance from the railway, whose business was suspended by the superior accommodation afforded by the railway. Thirdly, the analogy of the indictment for obstructing a highway does not apply to a case where there is a special and extraordinary damage to an individual. The illustrations put by my Brother Willes

(1) Law Rep. 2 H. L. 175.

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appear to me to be conclusive. Here, the narrowing of the road may or may not be injurious to the plaintiff's property. Whether it will be so or not is for the jury. That question was left to them, and they have answered it in the affirmative. For these reasons, it seems to me that, consistently with and adhering to the decision of the House of Lords in *Ricket's Case* (1), our judgment in this case ought to be for the plaintiff.

KEATING, J. I am of the same opinion. I am free to confess that at first I did experience no little difficulty in deciding that this was not affected by *Ricket's Case.* (1) If it was, of course there would be an end of the matter. It is to be observed that the Lord Chancellor in that case adopted the distinction taken by Erle, C.J., in the Exchequer Chamber (2), between *Chamberlain's Case* (3) and some of the other cases cited. The Chief Justice, who delivered the judgment in both, decided in favour of the claim of compensation in *Chamberlain's Case* (3), and against it in *Ricket's Case* (4), upon the ground that in the one case the land itself was injuriously affected, and in the other not. Now, what was it that injuriously affected the land in *Chamberlain's Case* (3), so as to bring the case within the provisions of the act of parliament? It was the partial obstruction of the old road, and the substitution of a new one, and so rendering the access to the plaintiff's premises less convenient. Both roads were public highways, and yet it was held in *Chamberlain's Case* (3) that the plaintiff's property was injuriously affected within the act. Now, the distinction is clearly removed by the judgment of the Lord Chancellor in *Ricket's Case.* (1) On looking closely at that judgment, it would seem that the Lord Chancellor upheld *Chamberlain's Case* (3), while he gives effect to the objection in *Ricket's Case.* (1) Agreeing with all that has fallen from my Lord and my two learned Brothers, the practical ground upon which I rest my judgment is, that the present case ranges itself within *Chamberlain's Case* (3), and not within *Ricket's Case* (1), because the highway has been permanently interfered with so as in the opinion of the jury to have

(1) Law Rep. 2 H. L. 175.
(2) 5 B. & S. 164, 165.
(3) 2 B. & S. 605; 31 L. J. (Q.B.) 201; in error, 2 B. & S. 617; 32 L. J. (Q.B.) 173.
(4) 5 B. & S. 156, 165.

diminished the value of the plaintiff's property. If there be any evidence to sustain the finding, we are bound to sustain it.

Rule discharged.

Attorneys for plaintiff: *Young, Maples, & Co., for T. W. J. Pearse, Bedford.*

Attorneys for defendants: *Hayes, Twisden, Parker, & Co., for Berridge & Morris, Leicester.*

[IN THE EXCHEQUER CHAMBER.]

Nov. 28.

CHAMPNEYS, CLERK, *v.* ARROWSMITH, CLERK.

Churchyard, in whom vested—New District—Effect of s. 10 *of Lord Blandford's Act,* 19 *&* 20 *Vict. c.* 104.

In 1816, under a local act, a new church was built in St. Pancras, which was to be "the parish church," the old church being thereby converted into a "parish chapel." In 1853, by an order in council, the original burial-place for the parish, which surrounded the old church, and also an additional ground provided under an earlier local act, were closed, and a cemetery was provided for the whole parish. In 1863, that part of the parish in which the old church stood was turned into a new district, and the "parish chapel" was declared to be the church of that district:—

Held,—affirming the judgment of the Court of Common Pleas,—that the 10th section of Lord Blandford's Act, 19 & 20 Vict. c. 104, did not operate to vest the old churchyard in the incumbent of the new district church, but that the freehold thereof still remained in the vicar of the parish.

ERROR from a judgment of the Court of Common Pleas in favour of the plaintiff upon a special case: Law Rep. 2 C. P. 602.

The defendant was heard in person.

Gray, Q.C. (*R. G. Williams* with him), for the plaintiff, was not called upon.

The judgment of the Court (Kelly, C.B., Martin, Bramwell, and Channell, BB., and Mellor, Shee, and Lush, JJ.) was delivered by

KELLY, C.B. We are all of opinion that the judgment of the Court of Common Pleas was right. The question submitted is,

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whether the freehold of the churchyard of old St. Pancras is still vested in the vicar of the parish of St. Pancras. Before the passing of the 32 Geo. 3, c. lxvi, this piece of ground constituted the only churchyard or burial-ground of the parish; and there can be no doubt that the freehold thereof was vested in the vicar at that time. The first question which arises is, whether that act made any change in the title to the churchyard. The act was meant only to enable certain trustees to provide additional land for the use of the inhabitants for the purposes of burial; and under it a piece of ground was purchased: but, this piece of ground being contiguous to the old churchyard, the two were inclosed together, no separation being made between them, as perhaps there ought to have been. This state of affairs continued until the year 1816, when it became necessary to provide further church accommodation for the parish; and accordingly the 56 Geo. 3, c. xxxix, was passed. By that act the new church built thereunder was declared to be the parish church of St. Pancras, and the original church was to become thenceforth the parish chapel. So things remained until the year 1853, the two pieces of ground, viz. the old churchyard and the ground provided under the 32 Geo. 3, c. lxvi, continuing to be used as the burial-ground for the parish. In that year, the burial-ground, which then consisted of the old churchyard and the new or additional burial-ground, was closed by an order in council, pursuant to the 15 & 16 Vict. c. 85, and a new cemetery was provided for the parish at Finchley, which is now the only place of burial for the parish of St. Pancras. Three years afterwards an act was passed which is commonly called Lord Blandford's Act (19 & 20 Vict. c. 104). Under the operation of that act a new district was formed, and the old church became vested in the incumbent of such new district. By the 10th section of that act it is enacted that "the freehold of the site of the church of any new parish created under this act, or the said firstly and secondly recited acts (1), and of the churchyard, burial-ground, and vaults *belonging thereto*, with the rights, members, and appurtenances thereof, but, in case the same shall be vested in any vestry by any local act of parliament, then not without the consent of such vestry, and the house of residence, with the appur-

(1) 6 & 7 Vict. c. 37, and 7 & 8 Vict. c. 94.

tenances thereof, and all the lands, tithes, tenements, and hereditaments, and other endowments belonging to such church, or held by or vested in any person or body corporate in trust exclusively for or for the exclusive benefit of the incumbent of such church, shall become and be vested in such incumbent and his successors for ever, and be held and enjoyed by him and them in right of such incumbency; and all lands, tenements, or hereditaments granted or conveyed for the site of any church, and upon which any church shall be built, or for a burial-ground, shall from and after the consecration of such church and burial-ground respectively remain and be freed from and discharged of all the estate, right, title, interest, claim, and demand of any person, body politic or corporate whatsoever into or out of the same or any part thereof respectively; subject, nevertheless, to any rent that may be reserved thereout, and to the covenants and conditions subject to which the same may have been granted or conveyed." If it were necessary to consider the matter, we may observe that this statute has no reference to the church or churchyard in question, but that it only applies to churches erected under that act, or the two other acts therein cited and referred to; whereas, this new church of St. Pancras was erected under the local act of 56 Geo. 3, c. xxxix. That alone would, as it seems to us, be fatal to the defence to this action. But, were it otherwise, the 10th section of the 19 & 20 Vict. c. 104 provides that the freehold of the site of the church of any new parish created under that or the recited acts, and of the churchyard, burial-ground, and vaults *belonging thereto*, &c., shall become and be vested in the incumbent and his successors for ever. Did this ground,—the churchyard of old St. Pancras,—then or at any time ever *belong to* this parish chapel? We are all clearly of opinion that it did not. What act or state of circumstances could transfer the right of the vicar in the freehold of the churchyard from him to the incumbent of this chapel or district church? There clearly is nothing in the 32 Geo. 3, c. lxvi, which could have that effect. Then, when we look at the 56 Geo. 3, c. xxxix, we find that all that it does is to provide, first for the building of a new church which was thenceforth to become the mother church of the parish, and then to provide that the old parish church should become a parish chapel.

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So far, there is nothing to affect the vicar's title to the freehold of the churchyard. To say that the old churchyard should thenceforth belong to the parish chapel, would be saying that a portion of that which was the general burial-ground for the whole parish shall be parcelled off and become vested in the incumbent of the district church. That never could have been intended: and, further, there are some sections of the 56 Geo. 3, c. xxxix, which would lead to a contrary conclusion. Thus, by s. 50, the vicar, churchwardens, and sexton of the parish for the time being are to receive the like burial-fees and dues from burials, monuments, &c., within the intended church and chapels and vaults as were then payable to them respectively in respect of burials, monuments, &c., within the present parish church or burial-ground, or such as might thereafter be settled by the vicar, &c. There "burial-ground" is used in the singular number, as applicable to the whole parish. Then, by s. 53 of a subsequent act, 1 & 2 Geo. 4, c. xxiv, the "fees for burials in the burial-grounds or places of the said parish," are to be applied in a way there pointed out. It therefore appears that down to the time of the closing of the burial-ground in 1853, the old churchyard and the additional ground provided under the 32 Geo. 3, c. lxvi, were treated as one burial-ground, without any separation or division, belonging to the entire parish. Then came the closing of the burial-ground, and the establishing a cemetery at Finchley. Looking, therefore, at the acts of 32 Geo. 3, c. lxvi, 56 Geo. 3, c. xxxix, and 1 & 2 Geo. 4, c. xxiv, what is there down to Lord Blandford's Act, either in the acts of parliament or in anything that has been done under them, which could cut off or separate this particular portion of the parish burial-ground from the rest? The fee in the churchyard was in the vicar in 1792; and down to the year 1856 there is nothing to affect his title. And, when we come to Lord Blandford's act,—assuming it to apply to this chapel,—what is there to shew that any portion of the burial-ground is to be separated from the rest, and to become annexed to the incumbency of the district church? There clearly is nothing. When, therefore, we find that, at the time that act came in force, the freehold of the churchyard was in the vicar, and that it so remained, though it had ceased to be used as a place of burial, and had no connection

or relation in particular to this district chapel, we see no ground for contending that the vicar's title had ceased, and therefore we think the plaintiff is entitled to the judgment of the Court.

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Judgment affirmed.

Attorneys for plaintiff: *Scadding & Son.*
Attorneys for defendant: *Bird & Moore.*

[IN THE EXCHEQUER CHAMBER.]

Nov. 29.

DELANY AND ANOTHER *v.* THE METROPOLITAN BOARD OF WORKS.

Metropolis Management Amendment Act, 1862 (25 & 26 *Vict. c.* 102), *s.* 106—*Limitation of Action—Claim of Compensation for Injury to Property.*

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By s. 106 of the Metropolis Management Amendment Act, 1862, no action or proceeding shall be commenced against the Metropolitan Board of Works for anything done or intended to be done under the powers of that board, under certain statutes, until after one month's notice, and "every such action and proceeding shall be brought or commenced within six months next after the accrual of the cause of action, or ground of claim or demand, and not afterwards":—

Held, (affirming the judgment of the Court of Common Pleas) that notice of claim and demand of arbitration for damage done to buildings by the Metropolitan Board of Works, acting under their statutory powers, is not such a proceeding against the Metropolitan Board of Works as to render it necessary that it should be made within six months after the damage is caused.

IN this case the defendants brought error upon a judgment of the Court of Common Pleas in favour of the plaintiffs. (1)

Raymond having been heard for the defendants,

Mellish, Q.C. (*Waddy* with him), for the plaintiffs, was stopped by the Court; Kelly, C.B., saying that the case was too clear for argument.

Judgment affirmed.

Attorneys for plaintiffs: *Lindsay & Mason.*
Attorneys for defendants: *N. Lindo & Sons.*

(1) Law Rep. 2 C. P. 532.

END OF MICHAELMAS TERM.

CASES

DETERMINED BY THE

COURT OF COMMON PLEAS,

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF COMMON PLEAS,

IN AND AFTER

HILARY TERM, XXXI VICTORIA.

1868
Jan. 31.

GRISSELL *v.* BRISTOWE AND ANOTHER.

Custom—Usages of the Stock Exchange, how far binding upon Persons employing Brokers to buy or sell thereon—Principal and Agent.

One who employs a broker to transact business for him upon the stock-exchange or other general market, impliedly authorizes him to deal according to the general and known usages and customs of that market, although he may not himself be aware of their existence. But, when an usage or custom is intended to be relied upon, it ought to be clearly and distinctly proved to exist, and to be so general and notorious that persons dealing in the market could easily ascertain it, and must be presumed to be aware of it: and, in order to bind persons who were not aware of it, it must also appear to be a reasonable usage.

The plaintiff was a holder of 80 shares in a company called Overend, Gurney, & Co., which were transferable, but by the rules of the company to complete the transfer a deed of transfer was required to be executed by both transferor and transferee, and to be registered,—such registration to be subject to the consent of the directors. On the 11th of May, 1866 (Overend, Gurney, & Co. having stopped payment on the 10th), one Barry, a stock-broker and member of the stock-exchange, sold these 80 shares, for the settling day, May 15th, to the defendants, who were stock-jobbers and also members of the stock-exchange,—the plaintiff's name not being disclosed to the defendants, nor the defendants' names to the plaintiff; but it was conceded that the defendants knew that Barry was a broker, and would assume that he was acting for a principal. On the settling

day, Barry, in making up his account of transactions in Overend, Gurney, & Co.'s shares with the defendants since the previous settling day, was found to have bought of the defendants 205 more shares than he had sold to them; and, accordingly those 205 shares were transferred and delivered, not by the defendants, but by the holders (by the procurement of the defendants) to the nominees of Barry, in accordance with the course of business of the stock-exchange. The plaintiff's 80 shares were not transferred to the defendants or their nominees, but to persons named by others with whom Barry had had dealings. On the 17th of May, Barry sent the plaintiff four transfers of his shares to four different persons for execution, with the names of the transferees therein. These transfers the plaintiff executed and returned to Barry; but they were never executed or registered by the transferees.

The following is in substance the evidence of the usage of the stock-exchange as to the setting off of purchases and sales of shares amongst the members:—On the settling day the buyer gives to the seller the name and address of the person to whom the shares are to be transferred, who is frequently a subsequent purchaser at a different price. The seller is bound to accept the name so given: and, when the shares are paid for, and a name given, the jobber is absolved from all further liability, and is not bound to see that the transfer of the shares is executed by the transferee, or that it is registered, or to indemnify the seller against future calls. If the jobber fails to give a name, he is bound to accept a transfer of the shares himself.

In consequence of the non-registration of the 80 shares in question, the plaintiff continued to be the registered holder of them, and was afterwards compelled to pay a call of 10*l.* per share thereon.

Upon a special case setting out the above facts, from which the Court were to draw inferences, and to say whether or not the evidence of the usage was admissible or sufficient:—

Held, by Bovill, C.J., and Willes and Keating, JJ., that the usage of the stock-exchange as to the setting off of shares as between the jobbers was not (even if proved by the above evidence, which they thought it was not) such a general, well-known, and reasonable custom or usage as to bind the plaintiff, and consequently that the defendants were liable under their contract for not having indemnified him against the subsequent call.

Held, by Byles, J., that the usage was reasonable and sufficiently proved; and that the defendants, when they paid the price of the shares and gave the names of their nominees, had done all that their contract required them to do.

Revd Judgt Exch 4 C.P. 36

THIS was an action brought to recover 800*l.* and interest thereon, the amount of a call of 10*l.* per share upon 80 shares in Overend, Gurney, & Co., Limited, made after the sale of the said shares by the plaintiff to the defendants.

The first count of the declaration stated that the plaintiff was possessed of 80 shares in a joint-stock company called Overend, Gurney, & Co., Limited, and was the registered owner thereof, subject to the regulations of the company contained in the articles

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of association of the company and the statutes in that behalf relating to such joint-stock companies; and, according to the said regulations, the person registered as the owner of shares therein continued liable to calls made in respect of the said shares while he continued registered as such owner; and thereupon, in consideration that the plaintiff would sell to the defendants the said shares of the plaintiff, and would transfer the same and deliver to the defendants, or to such other person or persons as the defendants should name, a transfer or transfers thereof signed by the plaintiff, the defendants promised the plaintiff that they the defendants, or such other person or persons as they would name for the purpose, would respectively accept the said shares and cause them to be registered in the defendants' names or in the name or names of such other person or persons as they should name as aforesaid, as the owner or owners thereof, according to the regulations of the said company, within a reasonable time in that behalf, so that the plaintiff might be relieved from further liability for calls subsequently made on or in respect of the said shares: that the plaintiff, in pursuance of the said agreement and sale, did afterwards transfer the said 80 shares to persons respectively named by the defendants, at their request, and did deliver to them respectively transfers thereof signed by the plaintiff; and that all conditions were fulfilled, and all things happened, and all times elapsed necessary to entitle the plaintiff to have the said shares registered as aforesaid and to maintain the action for the breach of the defendants' said promise thereinbefore alleged; yet that the defendants did not cause the said shares to be registered in their names or the names of either of them as owner or owners thereof, or in the names of the said persons respectively to whom the shares were transferred as aforesaid, according to the regulations of the said company, or otherwise, but left the same registered in the plaintiff's name, whereby the plaintiff became liable and was compelled to pay calls amounting, to wit, to 800*l*., subsequently to the said promise and transfers made by the company on and in respect of the said shares, and was damnified.

The second count alleged the promise to be that the defendants would indemnify and save harmless the plaintiff from liability for and against calls subsequently made on or in respect of the said

shares; and assigned for breach that the defendants did not indemnify and save harmless the plaintiff from liability for and against calls amounting to 800*l.*, subsequently to the said promise and transfers made by the company on and in respect of the said shares, and thereby the plaintiff was forced and obliged to pay the same, and was damnified.

The third count, after stating the contract and promise as in the second count, alleged that the plaintiff, in pursuance of the contract, was ready and willing to make a transfer of the said 80 shares to the defendants, but the defendants exonerated and discharged him from making such transfer, and the plaintiff at their request transferred the same to other persons, in substitution and stead of transferring the same to the defendants, and the defendants accepted such transfer as a substituted performance of the said condition to transfer the same to the defendants, and upon the terms agreed on between the plaintiff and the defendants that the said promise should remain in force and be performed in respect of the said shares so tranferred, &c.; breach, that the defendants did not indemnify the plaintiff, &c.

There was also a count for money paid, money received, and money found due to the plaintiff on accounts stated.

The defendants pleaded,—first, that they did not promise as alleged,—secondly, to the indebitatus count, never indebted,—thirdly, to the first and second counts, that the plaintiff did not execute and deliver transfers of the said shares respectively, as alleged,—fourthly, to the third count, that the defendants did not exonerate and discharge the plaintiff as alleged, nor did the plaintiff at the request of the defendants transfer to other persons, nor did the defendants accept such transfer as in that count mentioned, as a substituted performance of the condition to transfer them, and upon the alleged terms in that count mentioned. Issue thereon.

The cause came on for trial at the sittings in Middlesex after Michaelmas Term, 1866, when, by consent, the record was withdrawn, and it was agreed that a case should be stated by a referee for the opinion of the Court.

1. The plaintiff is a gentleman residing at Norbury Park, Dorking; and the defendants are stock-jobbers and members of

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the stock-exchange, carrying on their business in the London stock-exchange and at 82, Old Broad Street, London.

2. In May, 1866, the plaintiff was the holder and original allottee of 80 shares in Overend, Gurney, & Co., Limited. These shares were 50*l.* shares, with 15*l.* per share paid up.

3. Previously to the 10th of May, 1866, the defendants sold to Messrs. Barry & Co., of 7 Birchin Lane, London, stock-brokers and members of the stock-exchange, for the account day (May 15th), 385 shares in Overend, Gurney, & Co., at various prices.

4. On the 10th of May, 1866, Overend, Gurney, & Co., stopped payment.

5. On the 11th of May, 1866, the plaintiff instructed his stock-brokers, Barry & Co., to sell the said 80 shares for him.

6. On the same day, Barry & Co. sold on the stock-exchange, for the account day, the said 80 shares (and also subsequently, on the same day, and as a distinct transaction, a further number of 100 shares in the same company), and which said 80 shares were sold to the defendants on their own account, and in their ordinary course of business as stock-jobbers, at $11\frac{3}{4}$ discount, or 3*l.* 5*s.* per share. The plaintiff's name was not disclosed to the defendants; nor were the defendants' names disclosed to the plaintiff.

The following entry of sale was made in Barry & Co.'s checking-book:—"80 Overend G. $11\frac{3}{4}$ dis. Bristowe *a/c.* T. G." The following entry was made by the defendants in their checking-book:—"11th May. Overend Gurneys, 80, Barry & Co. $11\frac{3}{4}$ dis. 15th May." On the same day, Barry & Co. sent the plaintiff the following sold-note:—

"Thomas Grissell, Esq. "London, 11th May, 1866.

"Sold by your order and for your account
80 Overend & Co's shares at 15 paid,
$11\frac{3}{4}$ discount 260 0 0
"Brokerage 1/3 per share . . . 5 0 0

£255 0 0

"Payable on transfer on 15th inst.

"Barry & Co., 7 Birchin Lane, Cornhill."

[Messrs. Barry & Co. received from another jobber or jobbers to

whom they had sold shares in Overend, Gurney, & Co., a ticket or tickets with the names of the persons to whom the shares were to be transferred and the consideration to be paid for them, to be inserted in the transfers upon the same ticket or tickets, as the name of the broker who was to pay Messrs. Barry & Co. for them. Messrs. Barry & Co. then prepared the transfers, in accordance with the ticket, inserting the shares which the plaintiff had instructed them to sell, and sent them to the plaintiff for execution. Upon receiving them executed by the plaintiff, Barry & Co. handed them to the brokers, who paid Barry & Co. the amount of consideration-money mentioned in the transfers, and the stamp. Messrs. Barry had had no dealings with the brokers or with the transferees, but only with the jobber or jobbers who furnished their names. (1)]

7. The practice on the stock-exchange with respect to the carrying out and completing contracts of sales with dealers or jobbers is, that the dealer or jobber to whom shares are sold, when the account day arrives, gives to the seller the name of a person to whom the shares are to be transferred on or after the account day; and it is only in default of naming such transferees that the dealers take transfers of the shares to themselves.

8. On the 15th of May (the account day), Barry & Co. made up their accounts with the defendants, relating to all transactions between them since the previous account day. The result of the several dealings between them in Overend, Gurney, & Co.'s shares was, that Barry & Co. had bought from the defendants 205 more shares than they had sold to the defendants; and these 205 shares were transferred and delivered by the holders to the nominees of Barry & Co. on or subsequently to the said account day.

9. It is the practice of members of the stock-exchange, in settling their accounts with each other on the account day, not to deliver or transfer the actual number of shares sold in any particular undertaking by one member to another during the interval between two account days, but only the number which on balance of purchases and sales has been sold or purchased by one member in excess of the other.

(1) The portion of par. 6, which is within brackets, was added by consent during the argument of the case

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10. Accordingly, in settling the accounts between Barry & Co. and the defendants on the 15th of May, the plaintiff's 80 shares were not transferred to the defendants or their nominees, but to persons named by others with whom Barry & Co. had had dealings since the previous account day. The only Overend, Gurney, & Co.'s shares actually transferred to the nominees of Barry & Co. were the 205 mentioned above; and these were transferred, not by the defendants, but by the respective holders (by the procurement of the defendants), to persons named by Barry & Co.

11. On the 17th of May, Barry & Co. sent the plaintiff four transfers of his shares to four different persons for execution, with the names of the transferees therein, which transfers he forthwith executed and returned on the same 17th of May to Barry & Co.; but the said transfers were never executed or registered by the transferees. [A copy of the form of transfer was annexed to the case.]

12. On the 19th of May, Barry & Co. paid the 255*l.* to the plaintiff's credit with Messrs. Glyn & Co., his bankers. It was agreed that the evidence produced before the arbitrator by whom the case was settled, with respect to the usage of the stock-exchange hereinafter set forth, should form part of the case, subject to the decision of the Court upon its admissibility and effect. Such evidence was as follows:—"It was proved by several witnesses, who were stock-brokers and members of the stock-exchange, that, when shares are sold upon the stock-exchange by brokers to jobbers for the account day, the usage is, that, when the account day arrives, the buyer gives to the seller the name and address of the person to whom the shares are to be transferred, *who is frequently a subsequent purchaser at a different price; and in the transfer in such a case the consideration on the last purchase is stated in the transfer.* (1) If the name and address of the proposed transferee be given, the seller is bound to accept the name so given: and, when the shares are paid for, in the absence of any special bargain, the jobber is absolved from all further liability, and is not bound to see that the transfer of the shares is executed by the transferee, or that it is registered, or to indemnify the seller against future calls.

(1) The words in italic were added by consent during the argument.

"If the jobber fails so to give a name, he is bound to give his own name, and to accept a transfer of the shares. If the seller objects to the name given, he may complain to the committee of the stock-exchange, who, if they think the buyer has been guilty of improper conduct, may make him personally responsible.

"The same witnesses stated that, if a seller desires to secure the registration of the shares he sells into the name of the transferee, he makes an express bargain with the buyer, by which he sells them at a price lower than the market-price of the day, taking from the buyer a guarantee that the shares shall be registered by the transferee. Although all the witnesses agreed that this was the usage, only one could give a specific instance in which he had given such a guarantee.

"The witnesses stated that the whole of the above usage applies to the sale of shares in companies, whatever may be their solvency or repute. They also stated that during the last twenty years a usage had been adopted on the sale of shares in an insolvent company on which only a portion of their amount has been paid up, so that the holder is liable for further calls, by which such shares are sold, not merely at such discount as reduces their price to nothing, but at a still lower discount, so that the buyer is paid to take them. Thus, shares in a company of the nominal value of 20*l.*, on which 10*l.* have been paid, are sold at 12 discount, so that, on the account day, the seller, instead of receiving anything, has to pay 2*l.* to the buyer. The witnesses stated that the usage before described as to the settlement on the account day, applies also to these cases; and that the buyer who gives a name is not, in the absence of an express bargain, bound to see that the shares are registered, or to indemnify the seller against future calls. They stated also that this usage would equally apply to a case in which the name given by the jobber was that of a person who had bought the shares from the jobber since the purchase by the jobber from the broker, and that the jobber might, instead of giving only one name, give those of several persons to whom respectively he had sold the shares either before or since the purchase by him from the broker.

"None of the witnesses could remember a case in which any

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question arising out of this usage had ever come before the committee.

"The witnesses stated that no part of the above usage is prescribed by the printed rules of the stock-exchange; that the printed rules do not lay down every portion of the usages of the stock-exchange; but that there are many things which are settled by usage, of which the committee is the judge."

On the part of the plaintiff it was objected before the arbitrator that the evidence as to usage was inadmissible, upon two grounds,—first, that it could not be admitted to vary the express contract between the parties,—and, secondly, that no evidence was admissible of a usage, unless it was contained in the printed rules of the stock-exchange.

13. On the 11th of June, Overend, Gurney, & Co., Limited, passed a resolution to wind up voluntarily.

14. On the 22nd of June, the Court of Chancery made an order to continue the winding up under its supervision.

15. On the 31st of August, and after the transfers to the nominees of Barry & Co. had been executed by the plaintiff, and the shares delivered, the liquidators of Overend, Gurney, & Co., Limited, made a call of 10*l.* per share, payable on the 15th of September.

16. On the 25th of September, the plaintiff being unable, after the decision of the Court of Chancery in *Walker's Case* (1) to have his name removed from the list of contributories, paid the call. It was admitted, for the purposes of this case, that such call was properly paid by the plaintiff.

17. A transferee of five of the shares has since repaid the plaintiff the call upon five shares.

18. The defendants have always refused to indemnify the plaintiff, and repudiate all liability upon the shares.

19. For the purposes of this case, the printed rules of the stock-exchange, and the memorandum and articles of association of Overend, Gurney, & Co., Limited, were to be referred to by the Court and by either party.

20. The Court were to be at liberty to draw inferences of fact, in the same way as a jury, and were to have the same power of amendment as a judge at nisi prius.

(1) Law Rep. 2 Eq. 554.

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The question for the opinion of the Court was, whether, under the above circumstances, the defendants ought to indemnify the plaintiff from the call so paid by him. Should the judgment of the Court be in favour of the plaintiff, judgment was to be entered up for the plaintiff for 750*l.* and interest at 5 per cent., and costs. Should the judgment of the Court be in favour of the defendants, judgment was to be entered up for them, with costs.

J. Brown, Q.C. (*Lanyon* with him), for the plaintiff. It has been decided in several cases that the purchaser of shares is bound to indemnify the seller against all calls subsequently made upon him in respect thereof: *Walker* v. *Bartlett* (1); *Shaw* v. *Fisher* (2); *Wynne* v. *Price* (3); *Paine* v. *Hutchinson.* (4) The principle of these cases is, that the vendor sells not only the advantages but the burthens of the shares. The usage set up by the defendants, that, upon giving the name of a transferee, the jobber relieves himself from all further liability in respect of the contract, whether the transfer is accepted and registered or not, is repugnant to the very nature of the contract, which, in the case of an insolvent company, manifestly is, to shift the responsibility attached to the ownership of the shares: such a usage therefore would clearly be void. On a similar ground a usage at Lloyd's to allow the underwriter to set off the amount of a loss against a debt due to him from the broker for premiums upon other policies, was held to be void as against the assured, who had no notice of the alleged usage: *Sweeting* v. *Pearce.* (5) What was done as between themselves and the defendants on the settling day cannot affect the plaintiff. The cases as to the authority of agents when dealing for undisclosed principals to bind the latter, are collected in the notes to *George* v. *Clagett.* (6) But the fact that Barry & Co. were stock-brokers, and not stock-jobbers, was sufficient notice to the defendants that they were dealing for an undisclosed principal: and this appeared, too, by the entries in their books, which the defendants might have inspected; and that would be sufficient

(1) 17 C. B. 446; 25 L. J. (C.P.) 156; 18 C. B. 845; 25 L. J. (C.P.) 263.
(2) 2 De G. & Sm. 11.
(3) 3 De G. & Sm. 310.
(4) Law Rep. 3 Eq. 257.
(5) 7 C. B. (N.S.) 449; 29 L. J. (C.P.) 265; in error, 9 C. B. (N.S.) 534; 30 L. J. (C.P.) 109.
(6) 2 Smith's L. C. 5th ed. 113.

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notice: *Baring* v. *Corrie*. (1) The effect of the settlement of a debt with an agent was discussed in the recent case of *Catterall* v. *Hindle* (2), and it was held that such a settlement, no money being paid, was not binding on the principal, without a special custom of the trade. Barry & Co. had no authority from the plaintiff to buy back the shares or to release the defendants. The set-off, therefore, though possibly binding as between Barry & Co. and the defendants, by the usage of the stock-exchange, could not bind the plaintiff.

Hayes, Serjt., for the defendants. This is the first time it has been attempted to make a dealer, who is an intermediate agent between the buyer and the seller of shares, responsible for the registration of the transfer. From the facts stated in the special case no such contract can be implied. The decision in *Humble* v. *Langston* (3) proceeded very much upon the principle laid down in *Burnett* v. *Lynch* (4), where an assignee of a lease was held liable for not indemnifying the lessee against breaches of covenants in the lease whilst he continued such assignee: and in *Walker* v. *Bartlett* (5), the Court of Common Pleas held themselves bound by the decision of the Court of Exchequer in *Humble* v. *Langston* (3); but the judgment of the Exchequer Chamber rested the liability of the defendant to cause the shares to be registered in his own name, or to indemnify the plaintiff against subsequent calls, upon the fact of his acceptance of the transfer and his continuing so interested in the shares. That state of things is expressly negatived here: no shares were delivered to the defendants or their nominees; the only shares which were delivered, were delivered to other jobbers with whom Barry & Co. had had dealings.

[BYLES, J. In *Burnett* v. *Lynch* (4), there was a transfer of the property in the estate. Transfer here means nothing unless accepted by the transferee: it is not carried into effect without acceptance and registration of the transfer.]

The result of the whole transactions between Barry & Co. and the defendants is, that Barry & Co., who were employed by the

(1) 2 B. & A. 137.
(2) Law Rep. 1 C. P. 186; in error, Law Rep. 2 C. P. 368.
(3) 7 M. & W. 517.
(4) 5 B. & C. 589.
(5) 17 C. B. 446; 18 C. B. 845; 25 L. J. (C.P.) 156, 263.

plaintiff, sold the shares to some one else. It is enough, however, to say, that Barry & Co. were not the defendants' agents. The cases in equity have no bearing upon this question. According to the rules of the stock-exchange, and the custom proved before the referee, the defendants performed their contract when they settled with Barry & Co. in the manner recognized by that custom; for, it needs no authority to prove that where a person authorizes another to make a contract for him in a particular market, he must be assumed to have authorized his agent to make the contract with reference and subject to the usages and customs of that market. This rule has on numerous occasions been held to apply to transactions upon the stock-exchange. (1)

J. Brown, Q.C., in reply. Whether the transfer be to the defendants themselves or to their nominees, the defendants are equally bound to indemnify the plaintiff against the calls in question. No doubt, the general rule is that one who employs another to deal with him in a particular market impliedly authorizes him to deal according to the customs of that market. But there are many usages which may be binding upon the members of a place like the stock-exchange inter se, which would be unreasonable as against persons not members, and therefore not binding upon them. Thus, in *Sweeting* v. *Pearce* (2), a custom of Lloyd's to substitute another person as debtor to the principal, was held to bind only those who have notice of it. The custom here attempted to be set up is inconsistent with the contract, and therefore clearly unreasonable. Why is it to be assumed that one who employs a broker to buy or sell shares for him on the stock-exchange consents to be mixed up with all the dealings which his broker may have been engaged in during the interval between two settling days? A set-off of money demands between the broker and the jobber would not be allowed to the prejudice of the principal. Why, then, should a set-off of shares? Where an usage is set up, evidence may always be given in reply, to shew it to be unreasonable: *Bottomley* v. *Forbes*. (3)

(1) See the judgment of Lord Kingsdown, in *Kirchner* v. *Venus*, 12 Moo. P. C. 361.

(2) 7 C. B. (N.S.) 449; 29 L. J. (C.P.) 265; in error, 9 C. B. (N.S.) 534; 30 L. J. (C.P.) 109.

(3) 5 Bing. N. C. 121.

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At the close of the argument the Court desired to be informed whether or not they were to assume that the defendants knew that Barry & Co. were acting as brokers for a principal. The following statement was subsequently, with the assent of the respective attorneys, handed to the Lord Chief Justice:—

"The defendants were not informed, and had no actual notice, that Messrs. Barry & Co. were acting as agents for an undisclosed principal in the transaction.

"The defendants knew that Messrs. Barry & Co. were stock and share-brokers, and not jobbers. Upon a transaction between a jobber and a broker, *the jobber would assume that the broker was acting for a principal.* The stock-exchange committee do not countenance the practice of the same member acting in the double capacity of broker and jobber, and would call a member to account if he so acted."

Cur. adv. vult.

BOVILL, C.J. In this case I am about to deliver a judgment in which my Brothers Willes and Keating concur: but my Brother Byles, I regret to say, does not agree in the conclusion at which we have arrived.

The Court is required to give judgment upon the special case as stated by the arbitrator, with such alterations and additions as the parties have been able to agree upon during the argument.

The question does not depend upon any technicality in the pleadings, but is stated generally in the case to be whether the defendants ought to indemnify the plaintiff from the call of 10*l.* per share which was made on the 31st of August, 1866: and upon that question we are of opinion that the judgment should be in favour of the plaintiff.

The plaintiff was the owner of eighty shares in a company called Overend, Gurney, & Co., Limited, and which were transferable; but by the articles of association, clause 11, in order to complete the transfer, a deed of transfer was required to be executed by the transferor and transferee, and to be registered. On the day after the stoppage of the company, which occurred on the 10th of May, 1866, the plaintiff, being desirous of disposing of these shares, instructed Messrs. Barry & Co., who were stock-brokers and

members of the stock-exchange, to sell them for him. Barry & Co. on the same day contracted with the defendants (who were stock-jobbers, and also members of the stock-exchange) for the sale to them of these shares at 3*l.* 5*s.* per share, being $11\frac{3}{4}$ discount upon 15*l.*, which had been paid upon each share; and the contract was to be carried out on the 15th of May, being the next account day.

The transaction was conducted in the ordinary way in which such business is transacted on the stock-exchange: the name of the seller was not disclosed to the defendants; nor were the names of the defendants as the buyers disclosed to the plaintiff. The bargain was made between Messrs. Barry and the defendants personally, in their own names; and it was not mentioned to the defendants that Messrs. Barry were acting as agents or brokers in the matter: but, according to the additional statement which has been furnished to us by consent, the defendants must be taken to have known or to have believed, and indeed the statement is that they would assume, that Messrs. Barry were in fact acting for an undisclosed principal.

The effect of such a contract, according to the rules and usages of the stock-exchange, and especially rules 49 and 61 (1) of the printed rules, was, to render Messrs. Barry on the one hand and the defendants on the other personally responsible to each other, as between themselves, for its fulfilment, but at the same time leaving it entirely open for the plaintiff, as the undisclosed principal, to intervene and enforce his rights as the seller under the contract, and at the same time the defendants being at liberty, if they thought fit, to have recourse and to adopt any remedies

(1) The 49th rule is as follows:—"The stock-exchange does not recognize in its dealings any other parties than its own members; every bargain, therefore, whether for account of the member effecting it or for account of a principal, must be fulfilled according to the regulations and usages of the house; and, should a principal, without the consent of the committee, attempt to enforce by law a claim against a member of the stock-exchange, the committee will decide as to the liability of the broker or agent of such principal for any cost or damages incurred in consequence of legal proceedings."

The 61st rule is as follows:—"No member shall attempt to enforce by law a claim arising out of stock-exchange transactions against a member or defaulter, or against the principal of a member or defaulter, without the consent of such member, of the trustees of the defaulter, or of the committee."

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against the plaintiff as a principal in the transaction and the real vendor to them.

The case of *Mortimer* v. *M'Callan* (1) was one in which an undisclosed principal was made liable upon a similar contract, through a broker on the stock-exchange, for the sale of stock; and many instances have occurred where, upon a member of the stock-exchange becoming a defaulter there, his books have been handed over to the committee of the stock-exchange or to official assignees appointed by them; and contracts which he had made, and upon which he as a member of the house was personally responsible, have been enforced against his undisclosed principals, the money recovered being applied towards payment of the defaulter's debts to other members of the stock-exchange.

Indeed, from the 61st rule of the printed rules, p. 35, it seems to be clear that the members of the stock-exchange desire and intend to reserve to themselves the right to resort to the principals of a member or defaulter, in cases where it becomes necessary or their interest to do so. The 61st rule is as follows:—"No member shall attempt to enforce by law a claim arising out of stock-exchange transactions against a member or defaulter, *or against the principal of a member or defaulter*, without the consent of such member, of the trustees of the defaulter, or of the committee."

The contract in this case was to be carried into effect on or within a reasonable time after the 15th of May: and it was in the first place contended that what took place at and about that time absolved the defendants from all further liability in respect of the contract. The substance of what was thus relied upon is, that the defendants, having sold other shares in Overend, Gurney, & Co. to Messrs. Barry, and to a much larger number than those which had been purchased from them, arranged with Messrs. Barry to set against the shares which had been sold an equal number of those which had been purchased, and to deliver, or furnish names for the transfer of, the balance only of the shares which the defendants had sold to Messrs. Barry, and that this arrangement was carried out.

It could not for a moment be contended that such an arrangement between the defendants and Messrs. Barry, who were the

(1) 6 M. & W. 58.

plaintiff's brokers to sell the shares, and who were known to be acting for a principal, would be binding upon the plaintiff so as to relieve the defendants from the contract, without some assent, express or implied, by the plaintiff: *Fish* v. *Kempton*. (1) But it is unnecessary to refer to authorities upon that point. It was, however, insisted, on the part of the defendants, that the original contract, having been authorized by the plaintiff to be made on the stock-exchange, must be taken to have been authorized to be so made with reference and subject to the usages and customs of the stock-exchange, that the settlement relied upon was in accordance with those usages and customs, and that the defendants were therefore relieved from any further liability to the plaintiff.

There can be no doubt that a man who engages a broker to transact business for him in a general market, authorizes the broker to do so according to the general and known usages and customs of that market, although he was not himself aware of them; and it must be taken, and indeed has been decided, that the stock-exchange is within the description of a general market for this purpose, and is not a mere private place of business such as "Lloyd's" was considered to be in *Sweeting* v. *Pearce* (2) and other cases.

We have no doubt that, as between members of the stock-exchange, the course that was adopted in this case, of setting off purchases and sales of shares of the same description, is a very convenient mode of settlement, and one which may properly be adopted as between themselves: but it is a totally different matter when the rights of the principals and of a number of different individuals, who have no interest in common except that of having transacted business through or with the same broker, are sought to be affected; and it must be manifest that, if such settlements could be made so as to affect the rights of all the various principals whose contracts might be mixed up in the settlement, it would lead to almost endless difficulty and confusion as regards the rights of those principals. Persons having no knowledge of or connexion with each other, and between whom no contracts subsisted, would be mixed up together; several purchasers or sellers might be sub-

(1) 7 C. B. 687.

(2) 7 C. B. (N.S.) 449; 29 L. J. (C.P.) 265; in error, 9 C. B. (N.S.) 534; 30 L. J. (C.P.) 109.

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stituted for one or any number of such buyers or sellers; contracts might be thrown together or split up and divided as to the number of shares, and at prices entirely different from the original bargains; and no one would know to whom he was to look for the fulfilment of the particular contract into which he had entered, or what new or substituted contracts had been entered into on his behalf.

Where such an usage or custom is intended to be relied upon, it ought to be clearly and distinctly proved to exist, and to be so general and notorious that persons dealing in the market could easily ascertain it, and must be presumed to have been aware of it; and, in our judgment, in order to bind persons who were not aware of it, it must also appear to be a reasonable usage.

In the present case, some evidence was offered of the existence of certain alleged usages of the stock-exchange, and which was received subject to the questions of its admissibility and effect. This evidence is set out in paragraph 12 of the special case: but, in that part of the special case, we do not find any statement or proof of any usage or custom to the effect to which we have adverted; and all that appears upon this part of the subject is that which is contained in paragraph 9 of the special case. That paragraph, however, is not, as we understand it, a statement of such a general *usage* or *custom* of the stock-exchange as would be sufficient to bind third parties who were not aware of it and who did not assent to it, but rather of a mode of carrying on business, such as was relied upon in *Meyer* v. *Dresser* (1), or which prevails in many cases where such contracts are entered into; and it seems to us to amount only to the statement of a practice amongst the members of the stock-exchange for their mutual convenience in settling their liabilities amongst themselves in respect of transactions upon which as between themselves they are and would be personally and individually responsible to each other. In such a settlement of their own personal liabilities, this would, as we have before intimated, undoubtedly be a very convenient and reasonable course; but, if it were applied to the transactions and the rights and liabilities of their principals, it would, as it appears to us, be not only most inconvenient but in many cases almost impracticable.

(1) 16 C. B. (N.S.) 646; 33 L. J. (C.P.) 289.

Take, for instance, the case of a broker buying from a jobber 5 shares for 5 different persons on different days and at different prices, and on 3 other days selling for 3 other persons to the same jobber 3 other shares also at varying and different prices;—when the account day arrived, the broker would upon the balance have to receive 2 shares, and how could he distribute those amongst his 5 buyers? and which out of the 5 contracts of the jobber as a seller could be said to be cancelled and which in force? or what new or substituted contracts could be said to have been made? and by and with whom? The difficulties would be increased by supposing that the broker acted for 3 different buyers in purchasing from a jobber, say 102 shares, in numbers of 80, 17, and 5 shares respectively, and had made cross-sales to the jobber for 2 buyers of 94 shares and 6 shares respectively, making together 100 shares, and that each transaction was on a different day and at a different price; and the difficulty would be still further manifest as the number and intricacies of the cross-transactions were multiplied. Or, supposing that in this case Barry & Co. had sold only the plaintiff's 80 shares to the defendants, and had purchased of the defendants 60 shares and no more,—what, according to the defendants' contention, would be the legal result? and against whom must the plaintiff seek his remedy?

It seems tolerably clear that the original contract of sale by the plaintiff was not to be, and could not be considered, at an end by such a settlement; because the plaintiff had a right to be paid and was paid the price mentioned in his original contract with the defendants, viz. 255*l.*, and he was called upon to execute and did execute when so requested transfers of the 80 shares. It is clear also that there was no fresh contract of sale of the shares by the plaintiff to the several transferees mentioned in the deeds of transfer; and the prices mentioned in those transfers were totally different from the prices at which he sold and which he had to receive; nor had Messrs. Barry or any person authorized by the plaintiff ever made any contract of sale whatever to or with any of those parties.

The effect of the whole, as it seems to us, is, that these settlements which take place between members of the stock-exchange arrange their own personal liabilities, but leave the rights of their

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principals untouched. We think that the effect of the settlement in this case was, to make the payment by Messrs. Barry to the plaintiff of the 255*l.* a payment on behalf of the defendants, and to make the giving of the names and the taking of the transfers of the shares in the names of other persons, acts done by Messrs. Barry on the defendants' behalf, in order to carry out through Messrs. Barry the contract into which the defendants had entered and which they were personally liable to the plaintiff to perform. In other words, that, as between the defendants and Messrs. Barry, the latter by the settlement agreed to take upon themselves the carrying out for the defendants of the contract into which they (the defendants) had entered with the plaintiff.

For this new contract by Messrs. Barry with the defendants, there would be a perfectly good consideration as between the defendants and Messrs. Barry; whereas, the plaintiff never authorized or contemplated anything but the carrying out of the original contract of sale to the defendants: and this would leave the ultimate responsibility for the call upon these shares to fall upon Messrs. Barry, upon whom, under the circumstances, and subject to any rights which they may have acquired against other parties, we think it ought to rest.

Another point which was made on the part of the defendants was, that the giving of the names of the proposed transferees by Messrs. Barry was a sufficient performance of the defendants' contract, and that there was no obligation on the part of the purchaser, under a contract for the sale of shares in a public company like the present, to execute or register, or to procure the execution or registration by the transferees of the assignment, or to indemnify the seller against calls in case the assignment was not registered.

Independently of any binding usage or custom, after the decisions in the cases which have been cited, it would be idle for the defendants to contend for any such proposition. The plaintiff, being the owner of shares, and desirous to rid himself of them and of all future liability as well as benefit in respect of the shares, made the contract through Messrs. Barry to sell them to the defendants. The very object and essence of the transaction was that the shares should pass from the vendor; and in such a contract of sale of shares it seems to us that it must be implied that

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the plaintiff would execute and deliver a transfer to the defendants or to their nominees, and that, on the other hand, the defendants would pay the price and accept and register or cause to be accepted and registered a transfer of the shares; and with a further undertaking that the defendants would indemnify the plaintiff against calls which the plaintiff might be called upon to pay if and so long as the transfer was not registered.

In the case of a sale of shares, both parties must contemplate the transfer of the right to dividends and liability to calls; and, to shew that this is so understood on the stock-exchange, it is only necessary to refer to Rules 84 and 90 of the printed rules. By Rule 84 it is provided that "the seller of registered shares or stock is responsible for the genuineness and regularity of all documents delivered, and *for such dividends as may be received*, until reasonable time has been allowed to the buyer to execute and duly lodge such documents for verification and registration. When the buyer shall have obtained an official certificate of the registration of such stock or shares, the committee will not (unless bad faith is alleged against the seller) take cognizance of any subsequent dispute as to title, until the legal issue has been decided between the buyer and the company, the reasonable expenses of which legal proceedings shall be borne by the seller." And Rule 90 is that "the seller may, previous to delivery, *pay any call made on registered shares, although not due, and claim the same of the buyer.*"

But then it was contended that evidence was admissible of an usage of the stock-exchange (which it is not pretended was known to the plaintiff), to the effect that, upon a contract of sale of shares, the purchaser is not bound to see that the transfer is executed by the transferee or registered, or to indemnify the seller; and that, upon paying the price and merely giving a name or names to the seller (to which the seller is not at liberty to object), the buyer is absolved from all further liability under the contract. The evidence in support of such usage is set out at paragraph 12 of the special case.

The main object, and indeed the very essence of a contract of sale and purchase, in the case of shares, as it seems to us, is, that one party shall divest himself of and the other acquire in the name of himself or his nominee the ownership of the shares, which can

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only be by means of a transfer properly executed by both parties and registered; and that the seller shall relinquish and be relieved from and the purchaser assume all future benefits and liabilities in respect of the shares. If this be the intention of the contract, as we think it is, the admission of evidence of an usage or custom to the effect contended for by the defendants would be entirely to alter, defeat, and nullify the contract and the intention of the parties, and would be in direct contradiction of the contract: and we are of opinion, therefore, that such evidence was not admissible in this case. If the evidence was admissible, the statement of it is most unsatisfactory; and, performing the functions of a jury, we should not be disposed to act upon it: but this usage or custom, even if proved, as well as the practice of settlement between the members of the stock-exchange, is, as it seems to us, so entirely unreasonable for the purpose of affecting the rights of principals who are not members of the stock-exchange, that we should be disposed to refuse to give any effect to it, on that ground also.

That such usages must be reasonable, it is only necessary to refer to the case of *Bottomley* v. *Forbes* (1) and to the case of *Sweeting* v. *Pearce*, especially the judgments of Crompton, J., and Bramwell, B., in the Exchequer Chamber, as reported in 9 C. B. (N.S.) 539 and 540.

With regard to any contract or liability on the part of the persons named in the several transfers to indemnify the plaintiff, it is to be observed that neither the plaintiff nor Messrs. Barry nor the defendants had any dealings or transactions with these parties. They were persons wholly unknown to Messrs. Barry, except from the fact of their names being furnished by other jobbers to Messrs. Barry, upon transactions in which the plaintiff had no concern or interest, and upon bargains with various jobbers wholly unconnected with the defendants; and the persons whose names were thus given having no interest in the contracts which Messrs. Barry had made with those other jobbers. The prices of the shares inserted in the transfers were wholly different from those at which the plaintiff had sold his shares to the defendants; the persons named were strangers; and the shares were divided into four different parcels. The plaintiff, however, would be entitled to

(1) 5 Bing N. C. 121

be paid only the price inserted in his original contract. *That* alone was the contract into which he had entered; and he could look only to the defendants or to Messrs. Barry for performance of it. The arrangement as to the giving of the names in the manner before stated would seem to have been for the convenience of Messrs. Barry in their arrangements with the defendants, and for the purpose of Messrs. Barry carrying out the original contract between the plaintiff and the defendants, rather than for defeating that contract, or substituting any new contract by or with the plaintiff in its place; and, unless the transfers were executed or accepted by the transferees, there would in our opinion be no liability on their part to indemnify the plaintiff.

Where transfers of this description have been executed or accepted by the transferees, they are no doubt responsible, and liable to indemnify the vendor or transferor, as was decided by the Master of the Rolls in the case of *Evans* v. *Wood* (1), and by the Lord Chancellor in *Hawkins* v. *Maltby*, which was decided upon appeal, on the 14th of December last, since the argument of this case. (2) But, in the present case, although one transfer of five shares was accepted, and the transferee has repaid the plaintiff the amount of the call upon those five shares, yet the other transfers of the seventy-five shares do not appear to have been either executed or accepted by the transferees; and, under those circumstances, there would be no liability on their part to indemnify the plaintiff against the call on those shares.

The defendants, however, have not based their defence on the ground of these transfers having been executed or accepted by the transferees: their contention is that their liability as the purchasers on the original contract of sale from the plaintiff was discharged by the payment of the original price and by the mere handing of the several names such as and in the manner before described; and this, whether there was any acceptance of the several transfers by the nominees or not. The defendants rely, in support of this view, upon the alleged usage to which we have before adverted, but which in our opinion fails them, for the reasons which we have already stated.

If, then, there was a valid contract of sale of the shares, as we

(1) Law Rep. 5 Eq. 9. (2) 37 L. J. (Ch.) 58.

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think there was, between the plaintiff and the defendants, not discharged or affected, as between them, by the settlement in account of the cross-purchases and sales between the defendants and Messrs. Barry, and not fulfilled by the mere handing of a name and payment of the price of the shares, and the original contract between the plaintiff and the defendants thus remaining in force, what, if any, is the liability on the part of the present defendants to the plaintiff in respect of these shares?

Upon that point, although some nice distinctions were attempted to be made in the argument upon the form of the pleadings, it is not necessary to enter minutely into those considerations, because the point stated for our decision on the special case is, whether, under the circumstances, the defendants ought to indemnify the plaintiff from the call of 10*l.* per share which he has been compelled to pay by reason of his name remaining upon the register as the legal owner of the shares; and, if any amendment of the pleadings were necessary, it would of course be made.

The judgment of the Court of Exchequer Chamber in the case of *Walker* v. *Bartlett* (1), and of Vice Chancellor Stuart in *Paine* v. *Hutchinson* (2), in addition to the cases before referred to, are then direct authorities that both at law and in equity the defendants, as purchasers of the shares, would be liable to indemnify the plaintiff against the call in question. The decision in *Humble* v. *Langston* (3) is clearly distinguishable, on the ground that the defendant was there sought to be made liable upon a contract to indemnify the plaintiff against *all future calls*, and which clearly could not be maintained, as the liability could only continue during the time of the transferee remaining the assignee of the shares. It is also to be observed that, in the course of the judgment in that case, Parke, B., distinctly stated (4) that he considered that a seller may require the transfer to be executed and registered by the buyer. In that opinion we entirely concur. The liability to indemnify almost necessarily flows from it: and we are of opinion that the defendants are under the circumstances liable to indemnify the plaintiff against the call in question. Our judgment, therefore, is in favour of the plaintiff.

(1) 18 C. B. 845; 25 L. J. (C.P.) 263.
(2) Law Rep. 3 Eq. 257.
(3) 7 M. & W. 517.
(4) 7 M. & W. at p. 529.

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BYLES, J. This is a case of considerable importance to the parties, and of still greater importance to persons dealing on the stock-exchange, whether as principals, brokers, or jobbers. On this account, I the more regret that I cannot concur in the view of these transactions, and of the legal consequences thence resulting, taken by my Lord and the majority of the Court.

It is an action by the vendor of shares in a joint-stock company against a jobber on the stock-exchange; and the declaration charges in substance that, in consideration that the plaintiff would sell his shares to the defendants, and would transfer the same, and deliver a transfer to the defendants or to such other person as the defendants should *name*, the defendants promised that they or their nominees for the purpose should accept the shares and register. It then goes on to aver that the plaintiff *transferred the shares to the nominees of the defendants*, but the defendants would not cause the shares to be registered in their own names or the names of their nominees, or indemnify the plaintiff.

It will be observed that both the special counts of the declaration treat the persons whose non-registration is the cause of complaint as the nominees of the defendants. The cause of complaint is, not that the defendants did not come forward with nominees (for, the contrary is alleged), or that the nominees of the defendants would not receive a transfer, for a transfer was delivered to them; but that they would not register the shares in their own names.

The parties concerned in the transaction were,—first, the plaintiff, the vendor,—secondly, the plaintiff's brokers,—thirdly, the defendants' nominees for the purchase of the shares.

The plaintiff's broker, acting for the plaintiff, sold the shares to the defendants as jobbers. The defendants at the settling day produced, agreeably to the custom of the stock-exchange, the name of their nominee. A nominee is, as I collect from the case, a person who has agreed with the jobbers to become so, and therefore to accept the responsibility of purchaser of the shares. The defendants appointed and the plaintiff accepted that nominee. The plaintiff received the price, executed the transfer, and delivered it to the nominee. The nominee took the transfer from the plaintiff, as I collect, in pursuance of his (the nominee's) contract,

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without objection, and under such circumstances that, if it had become advantageous to register in his own name, he might have insisted on so doing. The nominee, however, refused to register. A fresh call has been made; and the plaintiff, instead of proceeding against the nominee in his (the plaintiff's) own name, if that be practicable, or in the name of any other person, now turns round and sues the defendants on an implied contract by the defendants either to indemnify the plaintiff against the consequences of that refusal or else to register the shares in their (the defendants') own names.

The plaintiff's brokers and the defendants are all members of the stock-exchange.

I collect from the evidence, that, according to the established and invariable usage of the stock-exchange (unless there be an express agreement to the contrary, and a lower price accepted in consequence), whenever a broker sells registered shares to a jobber, he sells them upon the terms that on the next settling day, or any other day that may be agreed on, the jobber shall give the name of the purchaser, or of some other nominee bound to take and register a transfer of the shares, and to whom the seller, in the absence of fraud, cannot object. When the seller's broker has received the price and the name of the nominee, his principal has no further claim on the jobber, but may execute the transfer and deliver it to the nominee, and call upon the nominee to accept it and to register the shares in his the nominee's own name. If the nominee, having received the transfer, refuse to register, the seller's remedy is, I conceive, against the nominee: see *Hawkins* v. *Maltby* (1); *Paine* v. *Hutchinson* (2); *Evans* v. *Wood*. (3)

Whether an action at law would lie at the suit of the vendor against the nominee, I do not think it necessary to determine, though I am by no means sure that an action would not lie; for, it may be that the nominee undertakes a liability to whoever turns out to be the original vendor, in analogy to the position of an advertiser of a reward for the restitution of lost goods, who in legal effect undertakes to pay the finder, whoever he may be. But, even if no such action lies, I think the vendor would be entitled to sue

(1) 37 L. J. (Ch.) 58. 3 Ch. 188 (2) Law Rep. 3 Eq. 257.
(3) Law Rep. 5 Eq. 9.

in the name of the jobber, or, perhaps, to file a bill for specific performance. But now, for the first time, as is alleged, the jobber is sought to be made personally responsible.

It is necessary to consider what character a jobber sustains. He is a person who has at his command, or within call among his connexions, stock or shares to a considerable amount, which he has power to sell; and, on the other hand, he has the command of money to buy stock or shares to a large amount for another class of his connexion. At his office, therefore, brokers who want to sell, and brokers who want to buy, may each be accommodated. He is, or may become, a sort of middleman or provisional purchaser and vendor for both parties respectively; and the advantage of employing him is this, that he at the same time and place provides a ready, or rather an instant, market both for buyer and seller. In ordinary cases, he does not become the ultimate purchaser; and the shares may and do change hands many times before the ultimate purchaser is reached; and they even may pass through the hands of several jobbers in succession. It is true, the jobber receives no brokerage from either side, but is, I believe, paid by an equivalent very like it, viz. the turn of the market, or difference of price to buyer and seller,—a compensation obviously inadequate to insure against indemnities such as are here insisted on. When the jobber pays the money and gives the name of his nominee to the seller's broker, his duty to the seller is at an end. If, indeed, the jobber fail to produce a name, according to the usage, he becomes the ultimate purchaser, and must himself take the shares and register them in his own name.

Such, according to the evidence, as I understand it, is the position of a jobber according to the custom; and, the defendants having, according to the facts above stated, sold the shares, paid the money to the plaintiff, and given the name of their nominee, who has received the transfer, I think the defendants are relieved from further liability.

But the case discloses another fact. The plaintiff's brokers had bought other shares in the same company of the defendants as jobbers to a larger amount than the plaintiff's shares; and, on the settling day, the plaintiff's brokers, instead of receiving the money from the defendants, had set off against the shares of the defen-

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dants the shares of the plaintiff, so that no money or shares passed on either side, so far as these particular shares are concerned. The shares do not appear to have been marked or distinguished from each other. This practice of setting off shares is also, according to the evidence, agreeable to the established custom of the stock-exchange.

I do not see why we as jurymen should disbelieve the evidence of such a custom, or as a Court of law hold it to be unreasonable. It seems to me to lead to the same result as if the defendants had handed their shares to the plaintiff's brokers and received the money, and then the plaintiff's brokers had handed his shares to the defendants and paid the same amount of money back again.

It was objected at the Bar that the name given is not the name of a purchaser from the defendants. But shares between the first sale and the actual transfer at the settling day may, as has been already observed, and constantly do, change hands and are sold many times over. It would be inconvenient and expensive if there must be as many transfers as there are sales; and it would answer no good purpose that I can perceive. According to the custom, as I understand it, the nominee may be a distant purchaser, or indeed no purchaser at all, if he consents to be nominee, and there is no fraud.

In brief, the custom amounts to this:—A jobber may assign his liability to a substitute, provided that at the day the jobber pays the money and produces his substitute. It is in effect a custom supporting such a change of contract as is well known in the civil law, and is called "novatio." The person of the creditor may be changed, or the person of the debtor or party liable. The latter change is called "expromissio." Here, in the events which have happened, the custom creates an "expromissio."

Fraud, no doubt, is an exception to all rules. But here no fraud is imputed to the defendants, and none can be presumed. And it may be further observed, that the stocks and shares sold on the stock-exchange are not always interests in insolvent or failing concerns, but stock of British and foreign governments, shares of large companies like the great railway companies where the calls are all paid up, and other valuable property. The customs of the stock-exchange set out in the case are unexcep-

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tionable in their application to such stocks and shares; and it is not easy to see how the custom could conveniently vary with the reputation of a company for solvency. In this very case, if the shares had risen in value, could not the nominee have insisted on registering in his own name?

Lastly, the plaintiff, though personally ignorant of the custom, yet, being principal, and employing his brokers to deal for him on an established and well-known market, is bound by the customs of that market.

For these reasons, I think the judgment should be for the defendants. But, the opinions of the majority of the Court being the other way, there will of course be judgment for the plaintiff.

Judgment for the plaintiff. (1)

Attorneys for plaintiff: *James & John Hopgood.*
Attorneys for defendants: *Lewis, Munns, Nunn, & Longden.*

JUNG *v.* PHOSPHATE OF LIME COMPANY, LIMITED.

Jan. 14.

Contract, Parties to—Signature for Self and Partners or Principals—Power of Attorney.

C. & Co., merchants in Spain, being possessed of mines in that country, gave one J. a power of attorney authorizing him to sell them for a sum not less than 40,000*l.*, J.'s remuneration being a moiety of any sum he might obtain beyond that price. J. contracted to sell the mines to the defendants, by an agreement which professed to be made "between J., acting for himself and also under a letter of attorney for and on behalf of A., B., and C., all three of them co-proprietors with him of various mines in Spain, and carrying on business in co-partnership with him under the style of C. & Co.," of the one part, and the defendants of the other part. In the body of the agreement C. & Co. were described as the "vendors," and there was a stipulation that the mines were to be delivered by the vendors to the company with a good title. The agreement was signed by J., "for self and partners," and was sealed with the seal of the company:—

Held, that J. alone could not maintain an action against the company for breach

(1) In *Sheppard* v. *Murphy* (Irish Rep. 1 Eq. 490), decided December 15th, 1867, the Vice-Chancellor of Ireland held that, under circumstances similar to those in *Grissell* v. *Bristowe*, in a suit for specific performance, there was no privity of contract between the vendor of the shares and the proposed transferee.

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of this agreement, but that A., B., and C., being parties to the contract, must be joined as plaintiffs.

THIS was an action for breach of an agreement for the purchase by the defendants, a company incorporated under the Companies Act, 1862, of certain mines of phosphate of lime in Spain.

At the trial before Bovill, C.J., at the sittings in London after last Michaelmas Term, it appeared that certain persons in Spain carrying on business under the firm of Concha & Co., wishing to dispose of certain mines of phosphate of lime, their property, employed the plaintiff, who was a commission-agent in London, to obtain a purchaser for a sum not less than 40,000*l.*, it being stipulated between them that, by way of remuneration for his services, the plaintiff should have a moiety of whatever should be realized beyond that sum; that, in order to carry out this object, Concha & Co. executed to the plaintiff a power of attorney by which, after stating that he had been appointed to carry on a negotiation as to the sale of the mines, they professed to grant to him "a mandate and ample power of attorney, whatever might be necessary, in order that, in the name of the partnership of Concha & Co., he might sign the provisional contract for the sale of the mines;" and that, acting under this authority, the plaintiff, on the 13th of April, 1866, entered into an agreement for the sale of the mines to the defendants, which agreement professed to be made "between George Alexander Jung, acting for himself, and also, under a certain letter of attorney duly executed and attested at Madrid on the 2nd of April, 1866, for and on behalf of Don Antonio Maria Concha, Don Santos Cuaco, and Don Florencin Martin y Castro, all three of them co-proprietors with him of various mines in Spain, and carrying on business in co-partnership with him under the style of Concha & Co., of the one part, and the Phosphate of Lime Company (Limited), of the other part." The agreement then proceeded,—"whereby the said George Alexander Jung, acting for himself and co-partners as aforesaid (who are hereinafter called 'the vendors'), agrees to sell and the said company to buy the said mines (naming them) belonging to the vendors." In the body of the agreement Concha & Co. were several times mentioned as "the vendors," and there was a stipulation that "the mines are to be delivered by 'the vendors' to the

company with a good title." The seal of the company was affixed to the document, and the execution by the plaintiff was as follows:—"G. A. Jung, for self and partners."

It was objected on the part of the defendants that, Concha & Co. being parties to the agreement, the action should have been brought in their names as well as in that of Jung.

The Lord Chief Justice was of that opinion, and directed a verdict to be entered for the defendants.

Sir G. Honyman, Q.C. (*Watkin Williams* with him), moved for a new trial, on the ground of misdirection. The agreement is between Jung and the defendants; though Concha & Co. may have an interest in it as between themselves and Jung. If Jung had failed to carry out the contract on his part, the company clearly might have sued him alone. There are many cases in which it has been held that a person entering into a contract as agent may sue or be sued thereon, especially where the principal is resident abroad: *Tanner* v. *Christian* (1); *Lennard* v. *Robinson* (2); *Cooke* v. *Wilson*. (3) *Deslandes* v. *Gregory* (4) is distinguishable; for there it was manifest that both the contracting parties were dealing as agents for merchants who were named, and they signed as such.

[WILLES, J. If Concha & Co. could sue upon this agreement, they must be made plaintiffs. In the case of *M'Laren* v. *Baxter* (5), persons, "for and on behalf" of whom a deed purported to be made, were held to be entitled to sue upon it.]

WILLES, J. I am of opinion that there should be no rule. The question is whether, upon the true construction of this document,—which is signed by the plaintiff, but which, being under the seal of the company, must so far as their liability is concerned be considered as a deed,—Concha & Co. were parties of the first part, and should have been joined with Jung as plaintiffs? That depends upon the form and language of the contract. If Jung and

(1) 4 E. & B. 591; 24 L. J. (Q.B.) 91.
(2) 5 E. & B. 125; 24 L. J. (Q.B.) 275.
(3) 1 C. B. (N. S.) 153; 26 L. J. (C.P.) 15.
(4) 2 E. & E. 602; 29 L. J. (Q.B.) 93; in Ex. Ch. 2 E. & B. 610; 30 L. J. (Q.B.) 36.
(5) Law Rep. 2 C. P. 559.

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Concha & Co. had been described as being parties of the first part, there could have been no doubt that they were parties to the deed, and no argument would have been needed to show that they must have brought the action jointly with Jung. Although they were to share the profits in different proportions, it is clear that Concha & Co. were interested jointly with Jung in obtaining the proceeds of the transaction. That being so, does it make any difference that the plaintiff is described in the agreement as acting for himself and also under a letter of attorney for and on behalf of Concha & Co.? The answer to that must depend upon whether or not the document is dealing with a matter in which Concha & Co. have a joint interest with Jung. *M'Laren* v. *Baxter* (1), a case decided upon a deed of composition under the Bankruptcy Act, 1861, appears to me to be precisely in point. The deed there professed to be made between Baxter of the first part, and the several persons whose names were subscribed and seals affixed to the schedule thereunder written, being respectively either individually or in co-partnership with others creditors of Baxter, "on behalf of themselves and all and every other the creditors of Baxter," of the second part,—so that the non-executing creditors were introduced under a formula similar to that which raises the question in this case. The Lord Chief Justice and my Brother Montague Smith, seeing that the deed professed to deal with the interest of *all* the creditors, came to the conclusion that as well those creditors who had not executed the deed as those who had were to be treated as persons who could maintain actions upon the deed. That case, therefore, is in point to shew that one who is mentioned in a deed as a person on behalf of whom it is entered into may sue upon it: and it appears to me to be quite right. Then arises the question whether all the parties are to sue jointly. The deed or agreement recites that the plaintiff and Concha & Co. are co-proprietors of the mines. They have, therefore, a joint-interest in the subject-matter. In the body of the instrument Concha & Co. are spoken of as "the vendors;" and Jung signs it on their behalf. I think it is impossible to come to any other conclusion than that Concha & Co. were parties to the contract, and ought to have been joined as plaintiffs.

(1) Law Rep. 2 C. P. 559.

KEATING, J. I am quite of the same opinion. Concha & Co. were clearly parties to the deed, and should have joined in the action: and I think the intention of the parties would have been totally defeated if Jung had been allowed to recover in his own name only.

MONTAGUE SMITH, J. I also am of opinion that there should be no rule. The plaintiff was known to be acting under a power of attorney from Concha & Co., and to be making a contract which should bind them as principals in accordance with the authority which he possessed. The contract describes Concha & Co. as parties on behalf of whom it is entered into. In the body also they are described as vendors, and they contract to give a good title to the mines. The signature, again, is not that of Jung separately and individually, but "for self and partners." The case is stronger than some of those referred to where the agreement has been signed not by the agent alone, but for himself and his principals.

BOVILL, C.J. This is not a mere technical objection. The plaintiff had, no doubt, reasons of his own for the course which he has adopted. The only question, however, for us to consider is whether the plaintiff can maintain the action alone. No authority has been produced by the plaintiff either at nisi prius or here to show that he could: and further consideration has satisfied me that the view I took at the trial was correct. In the first place, the agreement professes to be made between Jung, for himself and also under a power of attorney for and on behalf of the three persons composing the firm of Concha & Co., and the defendants. Again, in the body of the document, Jung is described as acting for himself and his co-partners, who are throughout called "the vendors." Concha & Co. are the only persons who could convey the mines. Who was to receive the benefit? It was not intended that Jung should receive the large sum which Concha & Co. stipulated for as the purchase-money. The form of signature, too, is not that of Jung alone, but "for self and partners," and that to a contract in which he professes to be acting under a power of attorney. In point of law, this was an agreement between the

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plaintiff and Concha & Co. of the one part, and the defendants of the other part; and Concha & Co. should have joined in suing upon it.

Rule refused.

Attorneys for plaintiff: *Thomas & Hollams.*

Jan. 14.

RYAN *v.* THOMPSON.

Metropolis Management Amendment Act, 1862 (25 & 26 *Vict. c.* 102), *s.* 96—*Right of Tenant to deduct from his Rent Payments of Money assessed upon the Premises for Works done under the* 105*th section of the Metropolis Management Act*, 1855 (18 & 19 *Vict. c.* 120)—*Landlord and Tenant.*

By s. 96 of the Metropolis Management Amendment Act, 1862, the owner shall allow the occupier to deduct out of the rent from time to time becoming due in respect of the premises the sums of money which the occupier pays to the vestry or district board for works done by them under the act:—

Held, that, to entitle the occupier to avail himself of that provision, the money must have been actually paid; and, consequently, that a distress, for rent which became due after service of a notice from the vestry, made before payment to the vestry-clerk, is not illegal.

THIS was an action for a wrongful distress. Plea, not guilty. The cause was tried before Bovill, C.J., at the sittings in Middlesex after last Easter Term. The facts were as follows:—

The plaintiff was tenant to the defendant of premises No. 10, Lancaster Road, Notting Hill, under an agreement whereby he engaged to pay "the land-tax, sewer-rates, metropolitan main drainage-rate, and all other rates, taxes, charges, and assessments whatsoever, except landlord's property-tax." On the 24th of December, 1866, the plaintiff was served by the vestry of Kensington with a notice of their intention to pave, &c., Lancaster Road, and also a notice requiring him not to pay his landlord the rent accruing due, but to pay it over to the vestry-clerk towards an estimated amount of 20*l.* 6*s.* 11¾*d.*, the proportion of the expenses of such paving, &c., chargeable in respect of the premises demised. These notices were transmitted by the plaintiff to the defendant on the 28th of December. On the 2nd of January, 1867, the defendant distrained the plaintiff's goods for 16*l.* 5*s.*, a quarter's rent due at

Christmas. On the 7th of January the plaintiff paid the 16*l.* 5*s.* to the vestry-clerk, and shewed the receipt to the defendant, who however kept the broker's man in possession until the following day, when he caused a sofa belonging to the plaintiff to be sold to defray the expenses of the distress and sale, amounting to 1*l.* 4*s.*

On the part of the plaintiff it was contended that a distress after notice from the vestry requiring the tenant to pay a sum exceeding the rent due, for which the landlord was liable, under the 96th section of the Metropolis Management Amendment Act, 1862, 25 & 26 Vict. c. 102 (1), was illegal; and that, at all events, by continuing in possession after he had notice that the money had been paid over to the vestry-clerk, the defendant became a trespasser ab initio.

For the defendant it was contended that the statute merely authorizes the tenant to deduct from his rent money which he

(1) The 96th section repeals ss. 217, 218, and 219 of the 18 & 19 Vict. c. 120, and in lieu thereof enacts that "it shall be lawful for any vestry or district board, at their discretion, to require the payment of any costs or expenses which the owner of any premises may be liable to pay under the recited act or this act, either from the owner or from any person who then or at any time thereafter occupies such premises, and such owner or occupier shall be liable to pay the same, and the same shall be recovered in manner authorized by the recited act and this act; and the owner shall allow such occupier to deduct the sums of money which he so pays out of the rent from time to time becoming due in respect of the said premises, as if the same had been actually paid to such owner as part of such rent. Provided always that no such occupier shall be required to pay any further sum than the amount of rent for the time being due from him, or which, after such demand of such costs or expenses from such occupier, and after notice not to pay his landlord any rent without first deducting the amount of such costs or expenses, becomes payable by such occupier, unless he refuse, on application being made to him for that purpose by or on behalf of the vestry or district board, truly to disclose the amount of his rent and the name and address of the person to whom such rent is payable; but the burden of proof that the sum demanded from any such occupier is greater than the rent due by him at the time of such notice, or which has since accrued, shall lie upon such occupier: Provided also that nothing herein contained shall be taken to effect any contract made or to be made between any owner and occupier of any house, building, or other property whereof it is or may be agreed that the occupier shall pay and discharge all rates, dues, and sums of money payable in respect of such house, building, or other property, or to affect any contract whatsoever between landlord and tenant."

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has actually *paid* to the vestry-clerk, and consequently that, as the distress was lawful when made, the defendant was entitled to proceed to realize the expenses of the levy.

A verdict was by direction of the Lord Chief Justice entered for the plaintiff for 5*l.* 5*s.*, and leave was reserved to the defendant to move.

Talfourd Salter, in Trinity Term last, obtained a rule nisi to enter a verdict for the defendant.

Keane, Q.C., and *Foard*, shewed cause. Under the 217th, 218th, and 219th sections of the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), the vestry or district board could only recover the expenses of paving new streets from the occupier to the extent of the rent due; the occupier, in the absence of any agreement to the contrary, being empowered to deduct the amount from his rent. The 96th section of the Amendment Act of 1862 (25 & 26 Vict. c. 102) repeals those provisions, and in substance re-enacts them, giving the vestry or district board the option of proceeding against either the owner or the occupier. The language of the section is not very intelligible; but its obvious meaning is, that the notice to the tenant not to pay his landlord operates as a sort of attachment, and that, when the vestry have elected to proceed against the occupier in the first instance, they cannot afterwards pursue their remedy against the owner. (1) Certain penal consequences (though it does not clearly appear what they are) are to result if the tenant pays his rent after notice from the vestry not to do so.

[BOVILL, C.J. The 96th section of the act of 1862 enables the tenant to deduct "the sums of money which he so pays out of the rent from time to time becoming due in respect of the premises as if the same had been actually paid to such owner as part of such rent." Has the tenant any answer to the landlord's claim for rent unless he has paid it over to the vestry?]

The statutory notice amounts to a prohibition to the occupier to

(1) In *Thompson* v. *Lapworth*, post, p. 149, the vestry proceeded by summons against the landlord after having given notice to the tenant, and obtained an order.

pay and to the landlord to receive the rent. To distrain after such notice would be oppression on the part of the landlord. The tenant could not make a tender of the rent to the broker.

[MONTAGUE SMITH, J. Suppose the owner had paid the demand of the vestry after the notice to the occupier, but before actual payment by him, what would be the consequence?]

Such a state of things evidently was not contemplated.

[WILLES, J. The notice is only a process to get the money from the occupier. If the money has not been paid when the landlord distrains, I should think the tenant's only remedy would be to deduct the amount from the next accruing quarter's rent. The words of the 96th section are very strong. They contemplate actual payment.]

It would be an intolerable hardship on the tenant if the landlord were held to have a right to distrain, when the debt has been already assigned to another body, and he has been prohibited from paying it to his landlord.

[BOVILL, C.J. I see nothing in the statute which amounts to such prohibition. It may be that the landlord may require the money to enable him to meet the demand of the vestry. Unless the tenant has paid the money to the vestry, he clearly is not within the words of the 96th section.]

At all events, the defendant was not justified in remaining in possession twenty-four hours after he had notice that the demand of the vestry was satisfied.

Talfourd Salter, in support of the rule, was not called upon.

BOVILL, C.J. It is not necessary in my judgment to determine whether or not the notice to the tenant to pay the sum assessed operates as a discharge to the landlord. What the plaintiff's counsel had to establish was, that the landlord's right to distrain was taken away. It has been ably argued that the mere giving of the notice by the vestry-clerk to the tenant amounts to a discharge of the rent, and to payment pro tanto. I do not, however, find any language in the act to warrant that position. The words are, "the owner shall allow such occupier to deduct the sums of money *which he so pays* out of the rent from time to time becoming due in respect of the premises, as if the same had been actually

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paid to such owner as part of such rent." I find no prohibition, either express or implied, against the landlord's pursuing his ordinary remedy where the rent has not been paid. And I see no hardship on the tenant in this. When a notice has been given, and the rent is due, he must pay the amount to the vestry. He cannot pay it to the landlord. In this case he did neither. He has therefore not brought himself within the act. A further point was made, viz., that the broker continued in possession after the money had been paid to the vestry-clerk. But expenses had then been incurred, which the tenant was bound to pay. I think the rule must be made absolute.

KEATING, J. I am of the same opinion. The machinery of the act certainly is not perfect; and I am fully impressed with the force of Mr. Keane's strictures upon its language. It seems to me, however, to be impossible to get over the difficulty pointed out by my Lord. Unless there be something in the statute which expressly or by necessary implication deprives the landlord of his ordinary remedy for the recovery of his rent, he clearly was at liberty to distrain. The rent was due, and it had not been paid. If the legislature had the intention which Mr. Keane suggests, they would have had no difficulty in expressing it. I agree also in the observation of my Lord as to the continuance of the broker in possession after the payment of the 16*l.* 5*s.* to the vestry-clerk.

WILLES and MONTAGUE SMITH, JJ., had left the Court before the conclusion of the argument.

Rule absolute.

Attorneys for plaintiff: *Scoles, Hanrott, & Pain.*
Attorney for defendant: *Wilding.*

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Jan. 16.

Metropolis Management Amendment Act, 1862 (25 & 26 *Vict. c.* 102), *s.* 96; *Assessment in Respect of Works done under s.* 105 *of Metropolis Management Act*, 1855 (18 & 19 *Vict. c.* 120)—*Landlord and Tenant—Construction of Covenant to pay all Taxes, &c., in respect of the Premises.*

By indenture of lease the lessee covenanted that he would during the continuance of the term pay and discharge "all taxes, rates, duties, and assessments whatsoever which during the continuance of the demise should be taxed, assessed, or imposed on the tenant or landlord of the premises demised in respect thereof," &c. The vestry of the parish having, under the provisions of the Metropolis Management Acts paved the street upon which the demised premises abutted, assessed the sum payable by the owner as his proportion of the estimated expenses thereof at 49*l.* 2*s.* 6*d.*, gave the occupier a notice under s. 96 of the act of 1862 requiring him to pay it, and, upon his failure to do so, took proceedings against the owner before a magistrate, and compelled him to pay:—

Held, that this was a "duty" or "assessment" assessed or imposed upon the owner in respect of the premises, within the covenant.

THIS was an action brought for the recovery of 35*l.* for rent, and 49*l.* 5*s.* 6*d.* for money paid by the plaintiff under the circumstances hereinafter mentioned. The following case was, by consent, and without any pleadings, stated for the opinion of the Court:—

1. By lease under seal, dated the 4th of June, 1862, the plaintiff and one Jacob Metcalfe, demised to the defendant a messuage and premises, No. 18, Carlton Villas, on the west side of the Edgeware Road, in the parish of Paddington, in the county of Middlesex (for twenty-one years, determinable at the option of the lessee, at the expiration of the first five, seven, or fourteen years of the term), at the yearly rent of 140*l.*, payable quarterly, "clear of all deductions in respect of land-tax, sewer-rate, and all other taxes, rates, and deductions whatsoever;" and the lessee covenanted that he, his executors, &c., "should and would well and truly pay the rent thereby reserved; and also should and would during the continuance of the term thereby granted pay and discharge all taxes, rates, duties, and assessments whatsoever which during the continuance of that demise should be taxed, assessed, or imposed on the tenant or landlord of the premises thereby de-

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mised in respect thereof, whether parliamentary, parochial, or otherwise (except property or income-tax)," &c.

2. Jacob Metcalfe died on the 26th of August, 1862.

3. On or about the 24th of January, 1867, the vestry of Paddington, pursuant to the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), and the Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), and in execution of their powers under those acts and the other statutes in that behalf, gave notice to the defendant, as and being the occupier of the said premises, that they had decided that Elgin Terrace, from No. 36, to Carlton Road, including the stables and premises at the rear of Carlton Villas from No. 17 to No. 25, was not paved to their satisfaction, and, having deemed it necessary and expedient that the said street should be paved throughout the whole breadth of the carriage-way and footpaths thereof, required him to pay the sum of 49*l.* 2*s.* 6*d.*, being the proportion of the estimated expenses of providing and laying such pavements, payable in respect of the said house in the defendant's occupation for which the owner thereof was liable. This notice referred the tenant to the 96th section of the Metropolis Management Amendment Act, 1862.

4. The defendant did not pay the 49*l.* 2*s.* 6*d.*, or any part thereof, and, although requested to do so by the plaintiff, refused to do so.

5. The amount not being paid, complaint was made by the vestry to a magistrate of the police-courts of the metropolis, and an order was made by him pursuant to the statutes for the payment by the plaintiff as owner of the premises of the 49*l.* 2*s.* 6*d.* to the vestry, and the further sum of 3*s.* for their costs, making together 49*l.* 5*s.* 6*d.*, to be levied, in default of payment, by distress and sale of the goods and chattels of the plaintiff.

6. The plaintiff thereupon paid to the vestry 49*l.* 5*s.* 6*d.*, in pursuance of the said order; and he claimed to have that sum, together with 3*l.* 3*s.*, being the fee paid by the plaintiff to his attorney for appearing on his behalf in answer to the said summons, repaid to him by the defendant.

7. At the time of the commencement of this action the sum of 35*l.*, for one quarter's rent, was due from the defendant to the plaintiff in respect of the said premises; but the same had before action been duly tendered to the plaintiff by the defendant.

The question for the opinion of the Court was, whether, according to the true construction of the lease, as between the plaintiff and the defendant, the defendant was bound to repay to the plaintiff the above-mentioned sums of 49*l.* 5*s.* 6*d.* and 3*l.* 3*s.*, or either of them, or any part thereof.

Lumley Smith (*Parry, Serjt.*, with him), for the plaintiff. The question turns upon the construction of the 105th section of the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), and the 96th section of the Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), and of the covenant contained in the lease under which the defendant holds. By the terms of the reddendum, the rent is to be "clear of all deductions in respect of land-tax, sewer-rate, and all other taxes, rates, and deductions whatsoever;" and the defendant covenants to pay and discharge "all taxes, rates, *duties*, and *assessments* whatsoever which, during the continuance of the demise, should be taxed, assessed, or imposed on the tenant *or landlord* in respect of the premises, whether parliamentary, parochial, or otherwise," except property or income-tax. The 105th section of the act of 1855 enables the vestry or district board to pave any street, and to charge the estimated expense to the owners of the houses forming the street. The 217th section makes the apportioned sum payable in the first instance by the tenant, and enables the tenant to deduct the amount from the landlord; the tenant's liability, however, being restricted by s. 218 to the rent for the time being due from him, and s. 219 provides that nothing therein contained shall be taken to affect any contract between any owner and occupier, whereby the occupier engages to pay all rates, dues, and sums of money payable in respect of such house, or to affect any contract whatsoever between landlord and tenant. The 77th section of the act of 1862 gives a remedy against "the present or any future owner of the premises, either by action at law or in a summary manner before a justice of the peace, at the option of the vestry or board." The 96th section (1) repeals ss. 217, 218, and 219 of the former act, and gives the vestry or board the option of requiring payment either from the owner or the tenant, with a similar limit as to the amount

(1) Ante, p. 145.

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recoverable from the tenant, and the like saving of contracts. The question is, whether the sum which the plaintiff has been compelled to pay is not such a charge in respect of the premises as was intended to be provided for by this covenant. In *Sweet* v. *Seager* (1), the words of the covenant were "all such parliamentary, parochial, and county, district, and occasional levies, rates, assessments, taxes, charges, impositions, contributions, burthens, duties, and services whatsoever as during the term should be taxed, assessed, or imposed upon or in respect of the premises, or any part thereof;" and these were held to be sufficient to render the tenant liable for the expense of drainage works done upon the premises under the authority of the act of 1855.

[WILLES, J., referred to *Tidswell* v. *Whitworth*. (2)]

The distinction between that case and the present is, that there the local act imposed upon the *owner* of the premises, and upon him alone, the *duty* of doing the work, upon failure of which he was liable to reimburse the commissioners the expense they incurred in doing it for him,—the tenant only being resorted to in order to give an easier remedy for recovering the money; whereas here the payment made by the plaintiff is a *money payment* by the landlord "in respect of the premises," within the very terms of the act of parliament, and of the defendant's covenant. In *Waller* v. *Andrews* (3), the charge was a "scot" in the form of a money payment to be made by the tenant; and in *Payne* v. *Burridge* (4), the act of parliament imposed upon the tenant the performance of a duty, or a money payment if he omitted to perform it; and both were held to fall within a covenant containing words not more comprehensive than those contained in this lease.

Holker, for the defendant. This is not a duty or assessment imposed on the landlord *in respect of the premises;* and, if it were, it clearly is not such a "rate, duty, or assessment," as was contemplated by the parties when they executed the lease. Apart from the decisions on the subject, it can hardly be imagined that the tenant, on taking so short a term (it may be five years only), would undertake to pay a charge imposed for the improvement of other premises besides those demised to him. The covenant

(1) 2 C. B. (N.S.) 119.
(2) Law Rep. 2 C. P. 326.
(3) 3 M. & W. 312.
(4) 12 M. & W. 727.

evidently contemplates such annual payments, as a tenant is ordinarily called upon to pay, viz., charges ejusdem generis with land tax and sewer rate. This is a personal debt which is charged upon the landlord in respect of property of his which is improved by the works. *Sweet* v. *Seager* (1), has no bearing on this case; the whole interest of the respondent there was demised to the appellant, and the language of the covenant was extremely wide,—"parliamentary, parochial, and county, district, and occasional levies, rates, assessments, taxes, charges, impositions, contributions, burthens, duties, and services whatsoever, as during the term should be taxed, assessed, or imposed upon or in respect of the premises thereby demised, or any part thereof." There is no material distinction between the language of this covenant and that in *Tidswell* v. *Whitworth*. (2) If there be any, that of the covenant there was more comprehensive than this: the word "impositions" is not found here. The 81st section of the 18 & 19 Vict. c. 120, requires a sufficient water-closet to be provided; and, if the owner of the premises fails in his duty in this respect, the vestry may cause the work to be done, and may levy the expenses in the same way as the expenses of paving, &c., may be levied. Would that be a charge upon the tenant? Neither in the 105th section of the 18 & 19 Vict. c. 120, nor in the 96th section of the 25 & 26 Vict. c. 102, is there a word about this being a charge "in respect of the premises."

[MONTAGUE SMITH, J. It is a charge imposed upon the landlord in respect of his being the owner of the premises. Is not that such a charge as is contemplated by this covenant?]

Baker v. *Greenhill* (3) is a strong authority to shew that a charge like this does not necessarily become payable "in respect of the premises" merely because the act of parliament gives the option to resort to the owner or the occupier to enforce payment of it. There, a landlord, liable with others to repair a bridge ratione tenuræ, demised the land, and the lessee covenanted to pay the rent "clear of land-tax, and all other taxes and deductions whatsoever, either parliamentary or parochial, taxed or imposed, or to be taxed or imposed upon the premises or upon the lessor in respect thereof, the landlord's property-tax only excepted": by a statute,

(1) 2 C. B. (N.S.) 119. (2) Law Rep. 2 C. P. 326. (3) 3 Q. B. 148.

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reciting the liability ratione tenuræ, and that part of the bridge was out of repair, it was enacted that the land-owners liable as above should repair and keep in repair the said parts during the continuance of the act, and, on their default, road trustees appointed under the act were empowered to do the repairs and recover against the owners, a power of distress being also given (against the owners or *occupiers*) to enforce payment: and it was held that the original liability for contribution to repairs did not become a parliamentary tax or deduction, within the lessee's covenant.

[WILLES, J. The imposition there was upon the owner; the resort to the occupier was given merely as a mode of levying the money.]

This case is concluded by *Tidswell* v. *Whitworth*. (1) The language of the statute there is almost identical with that of this act; and the language of the covenant was still stronger. The only possible distinction between the two cases is, that in the Manchester act the owners were required to do the work themselves; whereas here, the vestry are to do the work, and the owner to pay for it. As to the other cases referred to, they are clearly distinguishable, on the grounds pointed out in *Tidswell* v. *Whitworth*. (1) In *Waller* v. *Andrews* (2), the word "scots" was used in the covenant, a word which was peculiarly applicable to the imposition in question: and in *Payne* v. *Burridge* (3), the charge was in terms imposed upon the tenant himself.

Lumley Smith, in reply. If the decision of the Court is to be influenced by what was probably in the contemplation of the parties when this covenant was entered into, it is much more probable that they contemplated that the paving should be paid for by the tenant than by the landlord, inasmuch as it must have been known that the road would be paved within a short time, and the lease was made determinable at the shorter periods at the option of the tenant, and not at that of the landlord. The sum assessed for works done by the vestry under s. 105 of the act of 1855 is by s. 77 of the act of 1862 expressly declared to be charged "in respect of each house or premises." The present case falls clearly within *Sweet* v. *Seager* (4), and the earlier cases upon which that

(1) Law Rep. 2 C. P. 326.
(2) 3 M. & W. 312.
(3) 12 M. & W. 727.
(4) 2 C. B. (N.S.) 119.

decision proceeded; and even the reasoning in *Tidswell* v. *Whitworth* (1) is strongly in favour of the same construction of the covenant in question.

WILLES, J. I am of opinion that the judgment of the Court ought to be in favour of the plaintiff. The question turns upon the construction of a lease granted by the plaintiff and one Metcalfe to the defendant, reserving a rent of 140*l.* a year, clear of all deductions in respect of land-tax, sewer-rate, and all other taxes, rates, and deductions whatsoever; in which lease the defendant covenants to pay the rent, and also during the continuance of the term thereby granted to pay and discharge "all taxes, rates, *duties*, and assessments whatsoever which during the continuance of the demise should be taxed, assessed, or imposed on the tenant or landlord of the premises, in respect thereof, whether parliamentary, parochial, or otherwise, except property or income-tax." The question is whether a payment which the landlord has been compelled to make under the provisions of the Metropolis Management Amendment Act, 1862, is a tax, rate, or duty taxed, assessed, or imposed on the plaintiff as landlord in respect of the premises. That turns upon the construction of the statutes and the true character of the sum of money which it became the duty of the landlord to pay under the circumstances appearing in the case, which are that the vestry of the parish of their own motion thought fit to pave the street upon which the premises in question abutted, and to call for contribution from the owners of houses and land in the line of the street, and amongst others upon the plaintiff. The power to impose the payment on the landlord is contained in the 105th section of the 18 & 19 Vict. c. 120, and the 77th section of the 25 & 26 Vict. c. 102, as expanded by the 96th section. The 105th section of the act of 1855 provides that, in the event of the owners of houses calling upon the vestry or board to pave a new street, or of the vestry or board thinking it necessary that the street should be paved, the vestry shall cause the work to be done, and the owners shall on demand pay to the vestry the estimated expenses. The 77th section of the act of 1862 does not repeal the 105th section of the former act; but it extends the power to call for

(1) Law Rep. 2 C. P. 326.

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contribution from the owners of land bounding the street as well as the owners of houses, subject to a certain allowance, and it gives the vestry or board power to receive payment of the sums charged or assessed on the respective owners by instalments spread over a period not exceeding twenty years,—the remedy for the recovery of the money being still confined to the owner. The effect of these two sections is, that the owners may set the board in motion, or the vestry or board may of their own will cause the street to be paved and call upon the owners to pay the expense thereby incurred. If the plaintiff in this case had been one of the persons who set the vestry in motion, it might have been contended (with what chance of success I will not say) that he was party to the damnification, and cases might have been cited to shew that he could not complain of the consequences of his own act. That argument, however, is wholly inapplicable where the proceeding is taken by the vestry in invitum both of the owner and of the tenant. Such being the character of the payment, I will now refer to s. 96, by which the vestry or board are authorized to require payment of the expenses which the owner of any premises may be liable to pay under the former act or that act, either from the owner or the then or any future occupier; and the section goes on to enact that "the owner shall allow such occupier to deduct the sums of money which he so pays (1) out of the rent from time to time becoming due in respect of the said premises, as if the same had been actually paid to such owner as part of such rent,"—with a proviso the meaning of which is not very obvious, "that no such occupier shall be required to pay any further sum than the amount of rent for the time being due from him, or which, after such demand of such costs or expenses from such occupier, and after notice not to pay his landlord any rent without first deducting the amount of such costs or expenses, becomes payable by such occupier, unless he refuse, on application being made to him for that purpose by or on behalf of the vestry or district board, truly to disclose the amount of his rent and the name and address of the person to whom such rent is payable." What is to be done, if the occupier conceals the amount of the rent or the name and address of his landlord, does not very clearly appear. Then comes this further proviso: "Pro-

(1) See *Ryan* v. *Thompson*, ante, p. 144.

vided also that nothing herein contained shall be taken to affect any contract made or to be made between any owner and occupier of any house, &c., whereof it is or may be agreed that the occupier shall pay and discharge all rates, dues, and sums of money payable in respect of such house, &c., or to affect any contract whatsoever between landlord and tenant." The effect, therefore, of the 96th section is to give a remedy against the tenant, who is to be allowed to recoup himself out of the rent due from him unless there be some agreement between himself and his landlord to the contrary. The argument that the legislature, in s. 77 of the act of 1862, describes the payment in question as a charge "in respect of each house or premises," appears to be worthy of attention: it would seem that the payments assessed under the authority of the act are to be considered as payable in respect of the house, and not as chargeable on any person in respect of the house. But I prefer treating the proviso as in substance declaring, though with unnecessary verbiage, that the authority to deduct the payment from the rent is not to affect contracts entered into between the landlord and the tenant. I come back, then, to the terms of the contract itself and to the question whether the money which the landlord was bound to pay and did pay was a money payment falling within the terms of the defendant's covenant. It appears to me that it was. I think it was clearly a duty in the sense of a money payment imposed upon the landlord of the premises demised in respect thereof. Our attention has very properly been called by the defendant's counsel to other provisions of the statute, and to the familiar rule according to which general words following special words in deeds or acts of parliament are to be restricted to the particular genus; and that the words "duties and assessments" in this covenant are to be referred to matters ejusdem generis with those before referred to, viz. "taxes and rates:" and it was said that it was not likely that the parties in framing the covenant would contemplate that the tenant, whose term peradventure might last only five years, should pay an assessment which was imposed not as an ordinary rate or tax, but for the permanent improvement of the premises. The substance of the argument is this, that the duties intended by this covenant are not occasional or exceptional expenses incurred once for all in respect of permanent and

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substantial improvements, but duties or assessments accruing from year to year, or occasionally, like the old sewer-rate in the out districts,—matters of a recurring character. The argument is a strong and a captivating one, and one to which I might have yielded if it had not been excluded by decisions which ought to bind us. I think it is excluded by the case of *Payne* v. *Burridge*. (1) I cannot without carping at words point out any distinction between that case and the case now before us. By a local act, certain commissioners were authorized to pave certain streets, and to charge the proportion payable in respect of each house to the tenant or occupier, who was empowered to deduct the amount from his rent: the tenant, having paid the amount, claimed to have it repaid to him by his landlord, but was met by a covenant in his lease whereby he covenanted to pay (2) "all taxes, rates, duties, levies, assessments, and payments whatsoever which then were or during the term might be rated, levied, assessed, or imposed upon or payable in respect of the premises demised:" and the Court of Exchequer held that this covenant precluded the tenant from claiming to be recouped. "It cannot be doubted," said the Lord Chief Baron (3), "that the charge in question is an assessment or payment which, according to the terms of the contract, is to be borne by the tenant. Mr. Erle urges that by the act of parliament this burthen is cast upon the owner of the premises; and so no doubt it is: but the same may be said of sewer-rates, the payment of which, nevertheless, by the covenants of a lease may be thrown upon the tenant." The word "assessments" occurs in this lease. The Court there put a payment of the like character with the payment here upon the same footing as the sewer-rate or any other rate accruing from time to time. I need not further refer to the authorities except to say that *Baker* v. *Greenhill* (4) is distinguishable on the ground that that was the case of a common-law liability to repair ratione tenuræ, and that there was nothing in the act of parliament providing a more convenient mode of enforcing it to impose upon the occupier that obligation of the freeholder. *Waller* v. *Andrews* (5) and *Sweet* v. *Seager* (6), and

(1) 12 M. & W. 727.
(2) 12 M. & W. at p. 728.
(3) 12 M. & W. at p. 729.
(4) 3 Q. B. 148.
(5) 3 M. & W. 312.
(6) 2 C. B. (N.S.) 119.

especially the latter, which arose upon the 18 & 19 Vict. c. 120, turned upon the language of the contracts between the parties. We were much pressed by Mr. Holker with the case of *Tidswell* v. *Whitworth.* (1) Although that case received its answer in the course of the argument, I purpose to say a few words upon it; for, I cannot but feel that it falls very near the line. I think, however, it is distinguishable on grounds to be found in the judgment there pronounced. It turned upon the construction of the Manchester Improvement Act, 14 & 15 Vict. c. cxix., the scheme of which was, that the commissioners might call upon the owners of property to pave, &c., and imposed upon them the duty of so doing when called upon; and that, in default of their performance of that duty, after notice, the commissioners were empowered to do the work, and recover the expenses incurred therein from the owners,—the act giving an additional remedy against the tenants or occupiers for recovery of the amount, and authorizing the latter to deduct the payments as made from their rent. If the landlord had performed the duty in the terms in which it was imposed upon him, he would have had no claim against his tenant: it was not, therefore, a duty or liability to pay money in respect of which a deduction could be claimed. It was not unlike the common law liability to repair in the case of *Baker* v. *Greenhill.* (2) If the landlord had done the work himself, and had brought an action against the tenant to recover the amount expended thereon, he must have failed, inasmuch as there was nothing in the contract to compel the tenant to do that which the statute imposed upon the landlord, and which he had failed to do. This, without further remark, seems to me to distinguish this case from *Tidswell* v. *Whitworth.* (1) I do not desire to recall what I said in that case, viz. that these substantial improvements should fall upon the landlord. On consideration, I adhere to that judgment. It was not a money payment which could have been in the contemplation of the parties when they entered into the covenant. The covenant did not contain the language which this covenant contains, viz. duties and assessments assessed or imposed on the landlord in respect of the premises. I only refer to that to shew that I had not overlooked it. Upon the whole, having given my best atten-

(1) Law Rep. 2 C. P. 326. (2) 3 Q. B. 148.

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tion to this case, I feel compelled to come to the conclusion that the charge in question is one which the tenant himself was bound to pay, and consequently that the plaintiff is entitled to judgment.

KEATING, J. I am of the same opinion. These cases, depending as they do upon the construction of the particular covenant, always run very close. At first sight, the covenant in *Tidswell* v. *Whitworth* (1) certainly seems to be very nearly identical with that in this case. But, for the reasons given by my Brother Willes, it seems to me that the two cases are distinguishable. Looking at the difference in the language of the Metropolis Management Act and the Manchester Act, I think it is impossible to say that the payment in question does not fall within the very words of the covenant: it clearly was a duty imposed upon the landlord "in respect of the premises demised." It was urged by Mr. Holker that this could not have been intended to be a charge on the tenant, inasmuch as it was a charge incurred in the permanent improvement of the premises, and it might be that the tenant's interest in them would enure only for five years. But the argument is much weakened by the consideration that the twenty-one years term was determinable at the option of the tenant only, and not at that of the landlord.

MONTAGUE SMITH, J. I am of the same opinion. The Court, in *Tidswell* v. *Whitworth* (1), distinguished the case from a long line of authorities upon this subject. We did not intend (nor do I think it right that we should do so) to overrule any of those decisions, though I expressed an opinion that they had gone quite far enough. To that opinion I still adhere. I hold myself nevertheless bound by those decisions. I think we should be going a step beyond them if we were not to hold this case to be within the former cases and not within the distinction taken in *Tidswell* v. *Whitworth*. (1) For these reasons, I concur with my Brothers Willes and Keating that our judgment must be for the plaintiff.

BOVILL, C.J. I have not had the advantage of hearing the whole of the argument; but still I have heard enough to induce me to agree in the opinions of my learned Brothers. It seems to

(1) Law Rep. 2 C. P. 326.

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me that the word "duties" must be read here in the sense of money payments. In *Tidswell* v. *Whitworth* (1) that word had reference to an obligation imposed upon the landlord by the local act. His liability to pay the money arose from his neglect to perform a positive duty. Here, however, the "duty or assessment" did not result from any act or default of the landlord. I cannot distinguish this case upon any principle of law or fact from *Payne* v. *Burridge*. (2)

Judgment for the plaintiff.

Attorneys for plaintiff: *Powell, Thompson, & Groom.*
Attorneys for defendant: *King & M'Millin.*

HINTON *v.* SPARKES.

Jan. 18.

Vendor and Purchaser—Breach of Agreement—Forfeiture of Deposit—Liquidated Damages—I. O. U.

An agreement for the purchase of a public-house, with fixtures, &c., contained the following stipulations:—"And, as earnest of this agreement, the purchaser has paid into the hands of the vendor 50*l.*, which is to be allowed in part payment at the completion of this agreement. If the vendor shall not fulfil the same on his part, he shall return the deposit, in addition to the damages hereinafter stated: and, if the purchaser shall fail to perform his part of the agreement, then the deposit money shall become forfeited, in part of the following damages: and if either of the parties neglect or refuse to comply with any part of this agreement, he shall pay to the other 50*l.*, hereby mutually agreed upon to be the damages ascertained and fixed, on breach hereof." Instead of depositing the 50*l.*, the purchaser gave an I. O. U. for the amount. The purchaser failed to complete the purchase, and the vendor sold the public-house for 10*l.* less than the purchaser agreed to pay for it. In an action by the vendor against the purchaser for breach of the agreement, and upon the I. O. U.:—

Held, that the plaintiff was entitled to recover the 50*l.*, and was not limited to the amount of damage he had actually sustained.

Semble, that but for the clause for the forfeiture of the deposit, the 50*l.* would have been a penalty, and not liquidated damages.

FIRST count, for money payable by the defendant to the plaintiff upon accounts stated; second count, for breach of an agreement for the purchase by the defendant of the plaintiff's interest in a public-house.

Pleas: First, as to 1st count, never indebted. Second, as to

(1) Law Rep. 2 C. P. 326. (2) 12 M. & W. 727.

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2nd count, non assumpsit. Third, fourth, and fifth, as to same, non-performance of certain conditions precedent. Sixth, fraud.

The cause was tried before Keating, J., at the sittings in London after last Trinity Term, when the following facts were proved:—The agreement sued upon in the second count contained (amongst others) the following clauses:—"And, as earnest of this agreement, the said purchaser has paid into the hands of the vendor the sum of 50*l.*, which is to be allowed in part payment at the completion of this agreement; but, if the said vendor should not fulfil the same on his part, he shall return the deposit, in addition to the damages hereinafter stated. And, if the said purchaser should fail to perform his part of the agreement, then the deposit money shall become forfeited, in part of the following damages. And, if either of the said parties should neglect to perform or refuse to comply with any part of this agreement, the party so refusing or neglecting shall pay to the other of them the sum of 50*l.*, hereby mutually agreed upon to be the damages ascertained and fixed on breach hereof." The defendant (the purchaser) did not deposit the 50*l.*, but gave the broker employed by the plaintiff to negotiate the sale his I. O. U. for that amount, and promised to pay the money the next day.

The defendant subsequently failed to complete the purchase, and the plaintiff sold the public-house to another person for 10*l.* less than the defendant had agreed to give for it.

The defendant contended that the 50*l.* was in the nature of a penalty and not of liquidated damages, and that the plaintiff was entitled to recover only 10*l.*, his actual loss.

The plaintiff argued that the 50*l.* was recoverable as liquidated damages; and that, at all events, there was no answer to his claim upon the I. O. U.

A verdict was taken for the plaintiff for 50*l.*, leave being reserved to the defendant to move to reduce it to 10*l.*, if the Court should be of opinion that the plaintiff was only entitled to recover the damage actually sustained.

H. James, in Michaelmas Term last, obtained a rule nisi accordingly.

Laxton shewed cause. It was perfectly competent to the par-

ties to state an account. They did so here; and the defendant agreed to pay 50*l.* The plaintiff, therefore, was clearly entitled to recover that sum independently of the agreement. If there was a failure of consideration, that should have been shewn by plea: *Knowles* v. *Michel* (1); *Pinchon* v. *Chilcott* (2); *Seago* v. *Deane.* (3) In *Porter* v. *Cooper* (4), Alderson, B., says, "The cases have come to this, that an admission of a certain sum being due in respect of a demand for which an action would lie, is evidence sufficient to support a count on an account stated." All the earlier cases are collected in *Cocking* v. *Ward.* (5) Upon the question whether the 50*l.* was a penalty only or liquidated damages, the cases are conflicting; but the true rule seems to be that, where there are in an agreement stipulations of various degrees of importance, so that it is altogether uncertain what would be the true measure of damage for the breach of one or more of them, it is competent to the parties to stipulate that a certain sum shall be paid as liquidated and ascertained damages: *Lowe* v. *Peers* (6); *Reilly* v. *Jones* (7); *Kemble* v. *Farren* (8); *Boys* v. *Ancell* (9); *Beckham* v. *Drake* (10); *Green* v. *Price* (11); *Galesworthy* v. *Strutt* (12); *Atkyns* v. *Kinnier* (13); *Reynolds* v. *Bridge.* (14) He also cited Sugden's Vendors and Purchasers, 4th ed. 39, 40.

H. James, in support of the rule. But for the I. O. U., the case would have been clear. If this had been an action to recover the deposit, it could only have been recovered as damages.

[BOVILL, C.J. Is there any case where money deposited, as in this case, has been treated as a penalty and not as a liquidated sum?]

The 50*l.* is not forfeited absolutely on default, but it is to go in part of the damages. That assumes that the damages will be more than the 50*l.* Then, does the I. O. U. make any difference?

(1) 13 East, 249.
(2) 3 C. & P. 236.
(3) 4 Bing. 459.
(4) 1 C. M. & R. 387, 395.
(5) 1 C. B. 858.
(6) 4 Burr. 2225.
(7) 1 Bing. 302.
(8) 6 Bing. 141.
(9) 5 Bing. N. C. 390.
(10) 8 M. & W. 846.
(11) 13 M. & W. 695; S. C. in Ex. Ch. 16 M. & W. 346.
(12) 1 Exch. 659.
(13) 4 Exch. 776.
(14) 6 E. & B. 528; 26 L. J. (Q.B.) 12.

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It is nothing more than a promise to pay the money. It cannot be a good account stated unless there is a good consideration for it. The case of *Betts* v. *Burch* (1) is almost identical with the present.

BOVILL, C.J. By the terms of the agreement in this case a sum of 50*l.* was to be paid down by the vendee to the vendor, which was to be allowed as part-payment of the purchase-money on the completion of the purchase. The purchaser not being prepared to pay the 50*l.*, the vendor's agent took his I. O. U. for the amount, which the purchaser promised to pay and ought to have paid the next day. I agree that the mere giving an I. O. U., like the acceptance of a bill of exchange, does not preclude the defendant from shewing that there was no consideration. But here by the terms of the contract the defendant ought to have paid cash, and the I. O. U. was accepted by the vendor, and is for all purposes with reference to the agreement to be treated as money. It is clear there was a good consideration for it at the time. The question, therefore, turns upon the construction of the contract; and we have to ascertain the intention of the parties from the language they have used. In arriving at a proper conclusion, some assistance is to be derived from the decided cases. So far as the stipulation that 50*l.* shall be the damages ascertained and fixed on breach of the agreement goes, I should have no difficulty in holding, in conformity with the numerous authorities on the subject, that that was in the nature of a penalty, and not of liquidated damages. But there is a further stipulation that, "if the purchaser should fail to perform his part of the agreement, then the deposit money shall become forfeited." In none of the cases referred to do I find a provision like that. The 50*l.* was paid as a deposit, which in a given event was to be forfeited. In *Palmer* v. *Roberts* (2), which was also the case of a sale of a public-house, the purchaser paid a sum of 300*l.* by way of deposit, and in part of the whole purchase money, but afterwards refused to complete the purchase, whereupon the vendor re-sold. The question was whether the 300*l.* deposit was forfeited. The Court came to the conclusion that it was not, and that the purchaser might recover it back. The judgment, however, proceeded on the ground that inasmuch as the agreement contained a

(1) 4 H. & N. 506; 28 L. J. (Ex.) 267. (2) 9 Ad. & E. 508.

stipulation imposing a penalty of 1000*l.* on either party making default, the intention was clear that that was to be the only penalty for a breach. But it may also be collected that the view of the Court of Queen's Bench in that case was, that, in the absence of a stipulation to that effect, the deposit would not be forfeited. And in a later case of *Casson* v. *Roberts* (1), the Master of the Rolls says: "An agreement certainly might be made that the deposit should be forfeited in case the purchase should not be completed: but this must either be expressed or clearly implied from the contract itself. It has in many cases, from the terms of the contract, and even from its silence, been held that such a forfeiture must be inferred. There is, however, no authority which holds that the deposit must be considered as forfeited, in the absence of any agreement whatever, or one which could neither be enforced at law nor in equity." In that opinion I entirely concur. All that it is necessary, therefore, for us to do is, to see if there is any contract here, express or implied, that the deposit shall in the event which has happened become forfeited. There is an express contract here that the 50*l.* shall become forfeited on the purchaser's failure to perform his part of the agreement. It is true the words "in part of the following damages" are added. But I do not think that makes any difference. If the stipulation had simply been, "if the purchaser shall fail to fulfil his part of the agreement, then the deposit money shall become forfeited," there could not in my mind have been the slightest doubt. Treating the I. O. U. as money, the deposit was in the hands of the vendor. Assuming that to be the state of things, could the purchaser have recovered back the 50*l.*? Clearly not. The intention of the parties, as I collect it from the agreement, is, that this is to be taken as the ordinary case of payment of a deposit, which is to be forfeited on the purchaser's failure to complete the contract. That being so, it follows that the defendant has no answer to the action. This view is entirely in accordance with the decision of the Court of Queen's Bench in *Ockenden* v. *Henly*. (2) The numerous cases referred to as to the distinction between penalty and liquidated damages have in my judgment no application to a contract in the form of that now in question.

21 L. D. 25

(1) 32 L. J. (Ch.) 105, 106. 8 Jur. N. S. 1199

(2) E. B. & E. 485; 27 L. J. (Q.B.) 361. 4 Jur. N. S. 998

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WILLES, J. I am of the same opinion. If this agreement had not contained the provision for forfeiture of the deposit on the purchaser's failure to fulfil his part of the contract, we should have been bound to follow the decision of the Court of Exchequer in *Betts* v. *Burch*. (1) I for one should have done so for the reasons set out in the judgments of Barons Martin and Bramwell, which present as satisfactory and full a view of the cases and of the principles and reasoning applicable to them as is to be found in any book, or indeed in all the books put together; and I will not attempt to add anything to what is to be found there. Here, however, there is an express provision that the deposit money shall become forfeited should the purchaser fail to fulfil his part of the agreement. It is true the agreement adds "in part of the following damages," one of which is the 50*l*. I should presume that the reason for the insertion of those words is to be found in the fact of that part of the document being printed. We must either reject those words, or we must treat them as expressing that the deposit was really paid, and was to go in part satisfaction of the damages, if those damages should exceed the sum of 50*l*. But I feel rather inclined to treat it as a proof that, so far as the purchaser was concerned, the damages were to be a fixed sum. In the event of the purchaser's default, the deposit is to be forfeited; and there is abundant reason for supposing that the parties meant that the damages as against the purchaser should be the sum they have set down. There are many cases to support that view, if it were necessary to refer to them. The only other question is, whether the vendor is to be in any worse position because the deposit was not paid down at the time. I cannot see why the rights of the vendor should be affected by the purchaser's having committed two breaches of contract instead of one. All doubt, however, is removed by the giving of the I. O. U. If the money had been paid, the purchaser clearly could not have recovered it back.

Rule discharged.

Attorney for plaintiff: *H. Gover.*
Attorneys for defendant: *Spyer & Son.*

(1) 4 H. & N. 506; 28 L. J. (Ex.) 267.

PONSFORD *v.* WALTON.

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Jan. 23.

Evidence—Stamp—Deed of Assignment under Bankruptcy Act, 1861—*Act of Bankruptcy—Notice of Act of Bankruptcy.*

A deed of assignment under the Bankruptcy Act, 1861, Sch. D, may be given in evidence as proof of an act of bankruptcy, though neither stamped nor registered; and notice of the execution of the deed is notice of an act of bankruptcy.

H. being in difficulties, executed a deed in the form given in schedule D of the Bankruptcy Act, 1861, 24 & 25 Vict. c. 134. The deed was never stamped or registered. Immediately after its execution an attorney, acting both for H. and the trustees named in the deed, wrote to W., an auctioneer, informing him of the execution of the deed, and authorizing him to sell the goods of H. W. sold the goods, and, after the expiration of twenty-eight days, paid the proceeds to H. H. subsequently absconded, and was made a bankrupt. In an action by the assignee of H. under the bankruptcy against W. to recover the value of the goods, the deed was put in evidence, and its execution relied on as the act of bankruptcy:—

Held, that the deed, being given in evidence for a collateral purpose, and not to give effect to it, as a valid instrument, was admissible, although not stamped or registered; that the act of bankruptcy was complete on the execution of the deed; and that therefore W. had notice of an act of bankruptcy.

Ex parte Wensley (1 De G. J. & S. 273; 32 L. J. (Bk.) 23) acted on. *Ex parte Potter* (34 L. J. (Bk.) 46), questioned.

Declaration in trover, and on the common money counts, by the assignee of one Harris, a bankrupt.

Pleas: To the first count, not guilty, not possessed; and to the money counts, never indebted, payment, and set-off. Issues thereon.

On the trial before Byles, J., at the sittings in London after Hilary Term, 1867, the following facts appeared:—The bankrupt Harris had carried on business as a draper, and an execution having been put into his house, the defendant, an auctioneer, and one of the creditors of Harris, was employed by the sheriff to sell the goods. During the sale, Harris called a meeting of his creditors, and made an offer to them which was not accepted, and on the same day he executed a deed in the form given in schedule D to the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), but whether in consequence of arrangements made at the meeting of creditors or not, did not appear. The deed was executed by Harris and by the two trustees named in it, but by no one else, and it was never stamped or registered. It did not appear whether the trustees were creditors or not. On the same day Harris's attorney, who was

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also acting for the trustees, wrote to the defendant, informing him of the execution of the deed, and authorizing him to continue the sale on behalf of Harris and the trustees, and the defendant having sold the goods, paid the execution creditor and the expenses of the sale, and after the expiration of twenty-eight days paid over the remainder to Harris. Harris afterwards left the country, and was made a bankrupt. The plaintiff was appointed assignee under the bankruptcy, and brought this action to recover the balance which was paid by the defendant to Harris, on the ground that it had been paid after notice of an act of bankruptcy.

The plaintiff relied on the execution of the deed as the act of bankruptcy, and on the letter written by Harris's attorney to the defendant as notice of it, and tendered the deed itself in evidence; this was objected to on the part of the defendant, on the ground that it was not stamped or registered, but the learned judge admitted it.

A verdict was found for the plaintiff for 113*l.* 12*s.*, with leave to move to enter a nonsuit, or a verdict for the defendant, on the grounds that the deed not being stamped or registered was not admissible in evidence; and that there was no evidence of notice to the defendant of an act of bankruptcy.

Macnamara, having obtained a rule pursuant to the leave reserved,

Brown, Q.C. (*Graham* with him), shewed cause. The first question is whether the deed was admissible in evidence for the purpose of shewing that it amounted to an act of bankruptcy. Upon this there are two decisions of Lord Westbury, C., which appear to be conflicting: *Ex parte Wensley* (1) and *Ex parte Potter*. (2) In the former it was held that a composition deed might be given in evidence for such a purpose, though unstamped, and this is in accordance with other decisions. It has been always held that a document can be given in evidence to prove forgery or other crime, though not having the requisite stamp: see *Coppock* v. *Bower*. (3) This rule has been extended to the case of a fraudulent agreement, an unstamped instrument being admissible to shew that the agreement

(1) 1 De G. J. & S. 273; 32 L. J. (Bk.) 23.

(2) 34 L. J. (Bk.) 46.

(3) 4 M. & W. 361.

is fraudulent, and therefore void: *Keable* v. *Payne* (1), *Reg.* v. *Gompertz.* (2) In this case, as in those, the deed was given in evidence, not for the purpose of enforcing it, but to prove that it was fraudulent as against the creditors, and an act of bankruptcy, and therefore void.

The objection that it was not registered in accordance with the provisions of the 194th section of the Bankruptcy Act, 1861, is within the same principle, that section only applying to cases where the deed is given in evidence for the purpose of giving it effect. In the case of *Hodgson* v. *Wightman* (3) relied on for the defendant, the deed was put in evidence for the purpose of giving effect to it.

Secondly, the defendant contends that the deed was not intended to be operative, unless the requisite number of creditors signed. But there is no evidence of that intention. Formerly it was usual to put into composition deeds a condition that they should be void if not signed by the requisite number of creditors; but there is no such clause in this deed, and it was expressly decided in *Symons* v. *George* (4) that without such a clause, or proof that the parties intended the deed to be only an escrow, the deed is effectual at common law, and transfers the property to the trustees although no creditors sign.

Thirdly, it is said that as the deed might have been registered at any time within twenty-eight days after the letter written to the defendant, which is relied upon as the notice to him of the act of bankruptcy, and since if it had been so registered, the making of the deed would not have been an act of bankruptcy, the letter was only a notice that Harris might commit, not that he had committed, an act of bankruptcy. A similar question was raised in *Green* v. *Laurie* (5), and it was held that the notice was sufficient.

[BYLES, J. There the statute in question (6) said that the filing of a declaration of insolvency, which was the act of which notice was given, should be an act of bankruptcy *at the time* if certain circumstances followed.]

(1) 8 A. & E. 555.
(2) 9 Q. B. 824; 16 L. J. (Q.B.) 121.
(3) 1 H. & C. 810; 32 L. J. (Ex.) 147.
(4) 3 H. & C. 68; 33 L. J. (Ex.) 231; in error, 3 H. & C. 996; 34 L. J. (Ex.) 187.
(5) 1 Ex. 335; 17 L. J. (Ex.) 61.
(6) 5 & 6 Vict. c. 122, s. 22.

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The present case is stronger, as the execution of the deed is in itself an act of bankruptcy, unless subsequent acts, which in the present case did not occur, prevent its being so: *Edwards* v. *Gabriel* (1), is a similar decision upon the Bankruptcy Act, 1849 (12 & 13 Vict. c. 106), s. 76.

Macnamara, in support of the rule. This was a deed conveying the property to the trustees, and required a stamp under the Stamp Acts as well as under the 195th section of the Bankruptcy Act, 1861. The purpose for which it was given in evidence was not to prove fraud in the ordinary sense of the word: when the deed was first prepared, it certainly was not fraudulent, but was bonâ fide intended to be good under the Bankruptcy Acts, and though such a deed is held to be in some sense a constructive fraud upon the creditors, and therefore an act of bankruptcy, that is only because it passes the property, and the object of the evidence, therefore, was to shew that the deed was effectual, and not that it was void. All that was decided in *Ex parte Wensley* (2) was that the deed could be received in evidence against the debtor, and not that it could be received as against third parties. The case of *Ex parte Potter* (3), which is a later decision and precisely in point, is conclusive in favour of the defendant.

Secondly, if the deed could be received in evidence, it did not prove a completed act of bankruptcy; and there was no act of bankruptcy therefore of which the defendant could have notice. In *Symons* v. *George* (4), the only question was, whether the deed was effectual at common law as against the debtor, and the only point argued was, whether the trusts in the deed were possible, and the Court held that they were. *Green* v. *Laurie* (5), and *Edwards* v. *Gabriel* (1), were decided on the express words of other statutes, and do not therefore apply in the present case.

[BOVILL, C.J. The statute we are now considering says that the deed shall become valid, and so cease to be an act of bankruptcy in certain cases, of which the present is not one, while the other statute only said that the acts in question should become

(1) 6 H. & N. 701; 30 L. J. (Ex.) 245.
(2) 1 De G., J. & S. 273; 32 L. J. (Bk.) 23.
(3) 34 L. J. (Bk.) 46.
(4) 3 H. & C. 68; 33 L. J. (Ex.) 231; in error, 3 H. & C. 996; 34 L. J. (Ex.) 187.
(5) 1 Ex. 335; 17 L. J. (Ex.) 61.

acts of bankruptcy in certain cases. The words of the present statute, therefore, admit of still less doubt.]

In *Conway* v. *Nall* (1) notice of an inchoate act of bankruptcy was held insufficient.

[MONTAGUE SMITH, J. There the act of which notice was given was not in itself an act of bankruptcy, but an additional act was required to be done in order to make it so.]

The deed does not become a complete deed till it has been registered, and has no effect till then. In *Stanger* v. *Miller* (2), it was held that the title of the trustees dates from the registration only, and rent accruing between the execution and the registration of the deed can be set off.

Lastly, the deed, not having been signed by the creditors, was revocable.

[WILLES, J. I understand the cases to shew that the deed is revocable unless it has, according to some cases, been signed by, and, according to other cases, become known to, the creditors or some of them.]

In the present case the deed was only signed by the trustees, and it does not appear whether they were creditors or not, though it must be admitted that the defendant was a creditor.

BOVILL, C.J. I am of opinion that the rule should be discharged. The first question is whether the deed of composition, when tendered in evidence to prove the act of bankruptcy, was admissible, although unstamped. It does not follow that a deed which requires a stamp, cannot in any case be given in evidence if unstamped; for instance, in criminal law it has never been held necessary that a document should be stamped in order to make it admissible to prove forgery. So in other cases where documents are relied on to prove fraud or illegality, the exception is well established that they need not be stamped. In *Reg.* v. *Gompertz* (3), Lord Denman said: "Where the object of the evidence is not to enforce or set up the instrument as a valid instrument, but merely to shew that it was part of a scheme of fraud, and so to use it for a purpose collateral to the object apparent upon

(1) 1 C. B. 643; 14 L. J. (C.P.) 165. (2) Law Rep. 1 Ex. 58.
(3) 9 Q. B. at p. 839; 16 L. J. (Q.B.) at p. 125.

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the face of it, there are many cases in which it has been held that a written instrument, requiring a stamp but unstamped, is admissible." The principle of those cases seems to apply to the present case, in which the deed was relied on as a document fraudulent against the creditors of the bankrupt, and therefore void and an act of bankruptcy, and I think the stamp was unnecessary. This point was to some extent decided by Lord Westbury in *Ex parte Wensley* (1); there the question was as to the necessity of the deed being stamped and registered under the 194th and 195th sections of the Bankruptcy Act, 1861; but the principle seems to apply to the general stamp law; *Reg.* v. *Gompertz* (2) is another decision to the same effect. With regard to the case of *Ex parte Potter* (3), which was also decided by Lord Westbury, although the question was not as to the necessity of a stamp under the 194th section of the Bankruptcy Act, 1861, but under the general stamp laws, I find it difficult to reconcile that case with the principle of *Ex parte Wensley* (1); it would almost seem as if there were some mistake in the report, because I find the Lord Chancellor is reported to have said that it was clear the deed was produced as having been an effectual conveyance of the bankrupt's property: while from the rest of the report it would appear rather to have been put in evidence as having been an act of bankruptcy, and therefore void; and further, the cases which illustrate the ground on which we now hold that a stamp is not necessary, were not cited in the course of the Lord Chancellor's judgment in that case. If, however, the report is correct, and I am driven to elect between the two cases, I should not hesitate to adopt the decision in *Ex parte Wensley.* (1)

The same grounds would seem to be an answer to the objection that the deed was not registered or stamped, as required by ss. 194 and 195 of the Bankruptcy Act of 1861. Those sections refer only to what is required when the deed is set up as a valid deed, and not to cases where the deed is given in evidence for a collateral purpose, and with a view to show its invalidity and not to enforce it. The deed, then, being admissible, what was its effect? It was an assignment of all the property of the debtor, and that, though not

(1) 1 De G. J. & S. 273; 32 L. J. (Bk.) 23.
(2) 9 Q. B. 824; 16 L. J. (Q.B.) 121.
(3) 34 L. J. (Bk.) 46.

fraudulent in one sense, has always been held to be fraudulent within the meaning of the Bankruptcy Acts, and it is too late now to contest that doctrine. It has been argued, however, that the deed must be considered as conditional until it has been signed by the requisite number of creditors, and as not intended to take effect till such signatures have been obtained. But it was for the defendant to make this out as a matter of fact, and if he intended to rely upon it he should have produced evidence to that effect, and taken the opinion of the jury upon it. No evidence, however, was adduced which would have justified the jury in finding that fact in his favour. It was then contended that the deed not having been executed by any creditor was revocable. If it had appeared that the fact was really so, we should probably have allowed the matter to be investigated; but it is clear the defendant was a creditor and that the deed was communicated to him, and it seems probable that the deed was arranged at the meeting of creditors, and that the trustees who signed it were creditors themselves. I think, therefore, it would be useless for the case to go down for a new trial.

It was then argued that the deed would not operate to transfer the property till the end of the twenty-eight days; but I think that immediately on its execution it was a good deed at common law and transferred the property to the trustees: the cases cited by Mr. Brown support this view, and this point therefore fails. With respect to the remaining question, viz., whether there was a sufficient notice of the act of bankruptcy, it seems to me that the letter from the attorney of Harris was quite sufficient, and, indeed, if the deed really transferred the property before the end of the twenty-eight days, the objection, that there was no evidence of notice, falls to the ground.

BYLES, J. I am of the same opinion. With respect to the stamp, I think a deed need not be stamped, when it is given in evidence, not for the purpose of giving it effect and shewing it to be a good deed, but for the purpose of shewing that it is a bad deed. With respect to the allegation that it was only an escrow; it has at any rate been acted on, and that by the defendant himself. Then it is said that such a deed is not an act of bankruptcy till the twenty-eight days have expired without its being registered;

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but in truth it is in itself an act of bankruptcy without anything more, being an assignment of all the debtor's goods, subject only to the condition that it may be made valid by subsequent registration.

MONTAGUE SMITH, J. I am of the same opinion. The last argument for the defendant went to shew that the deed never had any operation at all, but was only an escrow, and revocable. I think that the foundation of this argument fails, for the facts shew that the deed was in operation as an assignment at common law; and the point was not thought worth relying on at the trial. Then the deed being operative in the sense of putting all the property out of the control of the debtor, it is said that it was not an act of bankruptcy, because it was inchoate and only part of a transaction which might have been valid; but if the deed could take effect at common law, then it was an operative deed independently of the Bankruptcy Act, 1861, and was a valid assignment by the debtor of all his property. If so, it is too late now to question the decisions, which show that the conveyance by a debtor of all his property to another is an act of bankruptcy, because its necessary effect is to delay his creditors; there may be no moral fraud, but it is a fraud upon the administration in bankruptcy of the debtor's property, as some cases say, because its effect is to distribute the property in a different way from that in which the Court of Bankruptcy would distribute it. If, then, this deed was an act of bankruptcy, it was complete when the deed became operative at common law. Lastly, the admissibility of the deed, though unstamped, depends much upon its nature, and the purpose for which it was used: it was not put in evidence as a valid deed, or to support a claim under it, but for a collateral purpose, namely, to shew that the debtor had done what in law is a constructive fraud. I think, therefore, it was rightly received. On these grounds I am of opinion that the rule ought to be discharged.

Rule discharged. (1)

Attorney for plaintiff: *Lloyd.*
Attorneys for defendant: *Litchfield & Burton.*

(1) Willes, J. left the Court before the conclusion of the argument.

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Jan. 23, 31.

Companies Act, 1862 (25 & 26 *Vict. c.* 89)—*Voluntary Winding-up—Set-off in Action for Calls—List of Contributories—Notice.*

In an action by the liquidator of a limited company being voluntarily wound up under the Companies Act, 1862, against a contributory for calls, the defendant may set off a debt due to him from the company. *Secus* where a limited company is being wound up by the Court or under the supervision of the Court. *Grissell's Case* (Law Rep. 1 Ch. App. 528) distinguished.

In an action for calls against a contributory of a limited company being voluntarily wound up, it is no defence that the defendant had no notice that his name was placed upon the list of contributories.

THE first count of the declaration stated that the plaintiffs were a limited company registered under the Companies Act, 1862, and that the defendant was a holder of fifteen shares in the company, and was as such holder indebted to the plaintiffs in 30*l.*, for a call of 2*l.* on each of the shares.

The second count was for interest.

The third count stated that the company was duly registered as a limited company, under the Companies Act, 1862; that the defendant agreed to become, and became and was, an allottee and shareholder in the company, of fifteen shares; that afterwards, and while the defendant was such shareholder, a resolution was duly made to wind up the company voluntarily, and that all things happened, &c., to make such resolution valid under the Companies Act, 1862; that a liquidator of the company was duly appointed, and that all things happened, &c., to make such appointment valid, and to confer upon him all the powers in that behalf given by the Companies Act, 1862; that, the defendant being such shareholder as aforesaid, and being in respect of the fifteen shares a contributory to the company within the meaning of the Companies Act, 1862, and the company being indebted to divers creditors not members of the company, in respect of divers debts, and being unable to pay the same, and it being necessary for the payment of the debts that the shareholders of the company should be called upon to contribute to the assets of the company, and the defendant being such shareholder in respect of the fifteen shares, and liable as such to contribute to the assets of the company, a call was duly made

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upon the defendant, with other shareholders in the company, to pay the sum of 2*l.* per share, in respect of each of the defendant's fifteen shares, amounting in all to the sum of 30*l.*; that all things happened, &c., to make the call valid; and that, by reason of the premises, the defendant was indebted to the plaintiffs in the sum of 30*l.*, yet he had not paid the same.

Pleas,—first, that the defendant was not a holder or contributory in respect of fifteen shares in the company; second, that the call of 2*l.* per share was not duly made by the company; third, that due notice of such call was not given to the defendant by or on behalf of the company; fourth, set off of a debt due from the company to the defendant; fifth, never indebted.

Issue thereon.

Demurrer to the fourth plea, and joinder.

Jan. 20, 23. *Day* (*Morgan Howard* with him), in support of the demurrer. The question raised by this demurrer is, whether a contributory of a company registered under the Companies Act, 1862, and in course of winding up under the provisions of that act, can, in an action against him by the liquidator in the name of the company for a call, set off a debt due to him from the company. Section 101 of the Companies Act, 1862, provides that the Court of Chancery may, at any time after making an order for winding up the company, make an order on any contributory directing payment of any moneys due from him to the company; and it may, in making such order, when the company is not limited, allow to such contributory by way of set-off any moneys due to him from the company on any independent dealing or contract with the company; and then comes a proviso that, "when all the creditors of any company, whether limited or unlimited, are paid in full, any moneys due on any account whatever to any contributory from the company may be allowed to him by way of set-off against any subsequent call or calls." By allowing the set-off where the company is not limited, the statute impliedly excludes it where, as here, the company is limited: and the reason is obvious, for, if the set-off were allowed in the latter case, the contributory having a claim against the company would be paid in full. The first clause of s. 133 provides that "the property of the company shall

be applied in satisfaction of its liabilities pari passu." This provision would be nugatory if a set-off were allowed in an action for calls. The point has already been decided by the Lord Chancellor and the Lords Justices in *Grissell's Case, In re Overend, Gurney, & Co.* (1) There, Mr. Grissell, who was a shareholder in a limited company, and also a creditor of the company, sought to enforce his claim to a dividend payable to the creditors, setting off a call on the shares held by him; but Kindersley, V.C., dismissed his summons, saying (2) "that a company was only a large partnership, modified in many important particulars by special enactment, but still in essence a partnership; that, where the statute did not expressly or impliedly vary the principles to be applied, those principles which applied to an ordinary partnership were applicable to a company; and that one of the principles of an ordinary partnership was, that none of the partners could claim any debt owing to him from the partnership estate until all the creditors who were not partners had been paid in full." This view was affirmed, on appeal. (1) In pronouncing judgment, the Lord Chancellor says (3): "The act creates a scheme for the payment of the debts of a company, in lieu of the old course of issuing execution against individual members. It removes the rights and liabilities of parties out of the sphere of the ordinary relation of debtor and creditor to which the law of set-off applies. Taking the act as a whole, the call is to come into the assets of the company, to be applied with the other assets in payment of debts. To allow a set-off against the call would be contrary to the whole scope of the act. In support of this view, it will be sufficient to refer to the 133rd section as to the satisfaction of the liabilities of the company pari passu. And the argument against the allowance of a set-off, addressed to the Court on behalf of the official liquidators, is extremely strong,—that, if a debt due from the company to one of its members should happen to be exactly equal to the call made upon him, he would in this way be paid 20*s.* in the pound upon his debt, while the other creditors might, perhaps, receive a small dividend, or even nothing at all." It is impossible to distinguish that case from the present.

(1) Law Rep. 1 Ch. Ap. 528. (2) Law Rep. 1 Ch. Ap. at p. 529.
(3) Law Rep. 1 Ch. Ap. at pp. 535–6.

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Horace Lloyd (*Rosher* with him), contrà. The call is a debt due from the contributory to the company, which is recoverable by action only. The defendant has a demand against the company which he might enforce by action. There is nothing in the Companies Act, 1862, to interfere with the primâ facie right of set-off which each party would under the statutes of set-off have against the other. This is the case of a voluntary winding-up of a limited company, the special provisions as to which commence with s. 129 of the act. The circumstances under which a company may be wound up voluntarily, and the effect of such winding up on the status of the company, are detailed in ss. 129, 131. The consequences which are to ensue upon the voluntary winding-up of a company are described in s. 133. In the case of a company in course of voluntary winding-up, there is nothing to bar the right of a creditor to maintain an action against the company, or to prevent his issuing execution upon a judgment obtained therein; the 163rd section, which makes void executions, &c., against the estate and effects of the company after the commencement of the winding-up, being confined to the case of a company being wound up by the Court or under the supervision of the Court. Expressio unius est exclusio alterius. There is no similar provision as to a company being wound up voluntarily. The only thing that can be suggested to the contrary is the provision contained in the first clause of s. 133; but that applies to the property of the company, and has nothing to do with satisfaction of its debts. A precisely similar provision in the case of debenture holders is contained in s. 26 of the Companies Clauses Act, 1863 (26 & 27 Vict. c. 118); and that, it is clear, would be no defence to an action upon a debenture-bond. A voluntary winding-up may be assimilated to a dissolution of an ordinary partnership: a winding up under the supervision of the Court more nearly resembles proceedings in bankruptcy. Winding-up by the Court is provided for by the 79th and subsequent sections of the act. Section 87 provides that, "when an order has been made for winding-up a company under this act, no suit, action, or other proceeding shall be proceeded with or commenced against the company, except with the leave of the Court, and subject to such terms as the Court may impose." If the Brighton Arcade Company, therefore, had been in course of

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winding-up by the Court, the defendant could not have brought an action against them for his debt. The Court is impowered in such case to make calls and to enforce payment thereof: ss. 102, 106. But there is no analogy between the order under s. 106 and an action brought by the company to enforce a call. The rights and remedies under the two proceedings are altogether different. If the voluntary winding-up is found to be prejudicial to the interests of the creditors, any one of them may cause it to be continued under the supervision of the Court: ss. 147, 148, 149.

Day, in reply. No distinction is taken in *Grissell's Case* (1) between a voluntary winding-up and a winding-up by the Court: and there is no reason why any such distinction should prevail. If Mr. Dowling had brought an action, his proceeding might have been summarily restrained under s. 138. (2) And, if he could not have maintained an action for his demand, neither could he set it off against a claim by the liquidator. By allowing a set-off, the whole scheme of the act will be frustrated.

BOVILL, C.J. This is an action brought by a limited company for money alleged to be due to them from the defendant for a call. The defendant has pleaded a set-off for a debt due to him from the company. Primâ facie there is a good debt disclosed by the declaration, and a good answer thereto by the fourth plea. It lies therefore on the plaintiffs to shew some law which prevents the application of the set-off. It has been contended on the part of the plaintiffs that there is in the Companies Act, 1862, an implied if not an express prohibition against such a plea; and the section mainly relied on is s. 101. If this had been the case of a company which was in course of being wound up by the Court or under

(1) Law Rep. 1 Ch. Ap. 528.

(2) 25 & 26 Vict. c. 89, s. 138, enacts that "Where a company is being wound up voluntarily, the liquidators or any contributory of the company may apply to the Court, &c., to determine any question arising in the matter of such winding-up, or to exercise, as respects the enforcing of calls, or in respect of any other matter, all or any of the powers which the Court might exercise if the company were being wound up by the Court; and the Court, &c., if satisfied that the determination of such question or the required exercise of the power will be just and beneficial, may accede, wholly or partially, to such application, on such terms and subject to such conditions as the Court thinks fit, or it may make such other order, interlocutor, or decree on such application as the Court thinks just."

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the supervision of the Court, I should have had no hesitation in saying that the set-off could not be allowed. But, upon looking at the general scope of the act, it appears to me to be manifest that that section is applicable only where the company is being wound up by the Court, and not to the case of a voluntary winding-up. The act makes a clear distinction between winding-up by the Court, voluntary winding-up, and winding-up subject to the supervision of the Court. There are distinct provisions carefully prepared applicable to each, as to settling the list of contributories, making calls, &c., and general clauses and supplemental provisions, some of which apply to all three. A voluntary winding-up is primâ facie for the purpose of settling the affairs of the company among themselves and the distribution of the assets, and generally where there is no deficiency of assets. The creditors are amply protected, because, by ss. 82 and 147, any creditor or contributory may apply to the Court for an order that the winding-up may be continued under the supervision of the Court; and in that case the 151st section provides that, "where an order is made for a winding-up subject to the supervision of the Court, the liquidators appointed to conduct such winding-up may, subject to any restrictions imposed by the Court, exercise all their powers, without the sanction or intervention of the Court, in the same manner as if the company were being wound up altogether voluntarily; but, save as aforesaid, any order made by the Court for a winding-up subject to the supervision of the Court shall for all purposes, including the staying of actions, suits, and other proceedings, be deemed to be an order of the Court for winding up the company by the Court, and shall confer full authority on the Court to make calls, or to enforce calls made by the liquidators, and to exercise all other powers which it might have exercised if an order had been made for winding up the company altogether by the Court." The creditors therefore are amply protected. And indeed, in the case of a voluntary winding-up, although there is no order, still a wide discretionary power is given to the Court by s. 138, upon application by the liquidators or any contributory, to do what is just. Where no such application is made, the rights of the parties must depend upon the express provisions of the statute. Section 101, being found in that division of the statute which relates

to winding up by the Court, has no application to the case of a voluntary winding-up. Then, when we come to the clauses relating to the duties of the liquidators, these, as to voluntary winding up, are to be found in s. 133. By the 9th clause of that section it is provided that "the liquidators may, at any time after the passing of the said resolution for winding up the company, and before they have ascertained the sufficiency of the assets of the company, call on all or any of the contributories for the time being settled on the list of contributories to the extent of their liability to pay all or any sums they deem necessary to satisfy the debts and liabilities of the company, and the costs, charges, and expenses of winding it up, and for the adjustment of the rights of the contributories amongst themselves; and the liquidators may in making a call take into consideration the probability that some of the contributories upon whom the same is made may partly or wholly fail to pay their respective portions of the same." And clause 10 provides that "the liquidators shall pay the debts of the company, and adjust the rights of the contributories among themselves." In the case, however, of a winding-up by the Court, the duty of making calls is cast upon the Court; and so, by s. 98, the distribution of the assets of the company is to be made by the Court, who are to "cause the assets of the company to be collected and applied in discharge of its liabilities." No doubt the Court would order the distribution to be made pari passu. Section 101 expressly excludes the right of set-off. But there is nothing in that part of the act which regulates voluntary winding up to exclude the set-off. When, therefore, we find in the one set of clauses an express exclusion of set-off, and no mention of it in the other set of clauses, the inference is plain to my mind that in the latter case it was not intended to be excluded. Many distinctions are to be found in other sections between the two modes of proceeding, besides the 163rd section, relied on by Mr. Lloyd, which strengthen the argument that s. 101 was not meant to apply to all cases. I would refer more particularly to ss. 153, 156, and 160, which deal exclusively with cases where the winding-up is by the Court or under its supervision. Mr. Day, on behalf of the company, relied much on *Grissell's Case*. (1) So far as the decision of

(1) Law Rep. 1 Ch. Ap. 528.

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Kindersley, V.C. (1) goes, it does not profess to be based upon the construction of the act. The Lord Chancellor and the Lords Justices do profess to decide upon the construction of the act: but their attention does not appear to have been drawn to the fact that that was not a case of voluntary winding-up, or to the distinction between the two cases. There, the winding-up, which had originally been voluntary, had been converted into a winding-up under the supervision of the Court, and so had for most purposes become the same as a winding-up by the Court. To such a state of things, the provision in s. 101 would of course apply. The result is, that, where the winding-up is by the Court or under the supervision of the Court, a set-off cannot be allowed in a court of law in an action for calls; but that, the act of parliament being silent on the subject, there is nothing to prevent a set-off where the action is brought by a company which is in course of winding up voluntarily. This judgment does not at all conflict with the decision in *Grissell's Case* (2), which proceeds upon an entirely different principle. I think the defendant is entitled to judgment on this demurrer.

WILLES, J. I am of the same opinion. The question in this case seems to me to be governed by the old Statutes of Set-off. (3) By those acts, mutual debts may be set off; and, unless there be some subsequent statutory provision which expressly or by necessary implication takes this debt out of the ordinary rule, the fourth plea affords a good defence. Now, in the case of a winding-up by the Court, or under the supervision of the Court, power is given to the Court to allow the set-off of a debt due from the company to a contributory. There is no similar provision for the case of a voluntary winding-up. I come, therefore, to the conclusion that the set-off here must prevail, unless there be something in the Companies Act, 1862, which renders it essential that it should not be allowed. Mr. Day contends that there is; because, if a set-off be allowed, a creditor who is also a contributory might have his debt paid in full, to the prejudice of the general body of creditors. It may be that in that case a voluntary winding-up would not do complete and substantial justice. That, however, only presents one

(1) Law Rep. 1 Ch. Ap. at p. 529.
(2) Law Rep. 1 Ch. Ap. 528.
(3) 2 Geo. 2, c. 22, s. 13; 8 Geo. 2, c. 24, s. 4.

instance of possible inconvenience, and one, too, which is not irremediable; because a means is pointed out in the 82nd and 147th sections whereby the difficulty may be obviated. As to all other cases which can be put, it is right that set-off should be allowed as between creditors and the company or shareholders inter se.

KEATING, J. I am of the same opinion. In this action for a debt, the defendant has primâ facie a right of set-off, unless he is deprived of that right by some statute. Mr. Day has contended that the 133rd section of the Companies Act, 1862, takes away the creditor's right of action and of set-off also as against the company, if not expressly, at all events by implication, because it provides in the 1st clause that the property of the company is to be applied in satisfaction of its liabilities pari passu. But, when I find that the legislature, when it was intended, in the case of a company being wound up by the Court or under the supervision of the Court, that no action should be brought (s. 87), and that no set-off should be allowed, except subject to the sanction and control of the Court (s. 101), makes an express provision on the matter, and that there is no such provision for the case of a voluntary winding-up, I am compelled to come to the conclusion that in the latter case no such exclusion was intended. Our judgment will not at all conflict with *Grissell's Case.* (1) When the Court of Chancery is, so to speak, seised of the winding-up, it has ample powers to make all equitable arrangements between the company and its creditors and contributories. But, sitting in a court of law, we are bound to give effect to a claim of set-off, unless we find it excluded by express enactment or by necessary implication. I find none such here.

MONTAGUE SMITH, J. I am of the same opinion. This is the case of a company which is being wound up voluntarily, and in no way subject to the control or intervention of the Court of Chancery. Primâ facie, therefore, it is for the convenience of the company that the set-off should be allowed. The call sued for is a debt due from the defendant to the company. The defendant has a claim for a debt against the company, for which he might sue them, and they would have no defence. There might, therefore, have been

(1) Law Rep. 1 Ch. Ap. 528.

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cross actions. That being so, the Statute of Set-off must have effect, unless its operation is prevented by some subsequent legislation. I am unable to collect from the language of any of the provisions of the Companies Act, 1862, as to voluntary winding-up, any intention on the part of the legislature to repeal the statute of 2 Geo. 2, c. 22. In the case of a winding-up by the Court, or under the supervision of the Court, the right to bring an action is expressly excluded, and the allowance of a set-off is discretionary with the Court of Chancery. But, in the case now before us, the rights of the parties are left to be determined by the ordinary rules of law. Each had a right of action against the other: and the right of set-off follows.

Judgment for the defendant.

The issues of fact were tried before Montague Smith, J., at the sittings in London after last Trinity Term; and it not being proved that the defendant had notice of his name being upon the list of contributories, it was contended that there should be a nonsuit.

A verdict was taken for the plaintiffs for the amount of the call, subject to leave to the defendant to move to enter a nonsuit, if the Court should be of opinion that the giving the notice was a condition precedent to the plaintiffs' right of action.

Rosher, in Michaelmas Term last, obtained a rule nisi accordingly.

Jan. 30, 31. *Day*, *Hayman*, and *Morgan Howard*, shewed cause. The defendant is clearly a contributory within the 38th and 74th sections of the Companies Act, 1862. By clause 7 of s. 133, the liquidators under a voluntary winding-up may, without the sanction of the Court, exercise all powers by the act given to the official liquidator; and the 8th clause provides that the liquidators may exercise the powers thereinbefore (s. 98) given to the Court of settling the list of contributories of the company; and that any list so settled shall be primâ facie evidence of the liability of the persons named therein to be contributories. If any contributory has reason to object to his name being upon the list, he may apply to the liquidator to rectify it under s. 98, or may appeal to the Court

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under s. 138. (1) An order made by the Court upon a contributory, in the case of a winding-up by the Court, is, by s. 106, subject to appeal (s. 124), made conclusive evidence that the moneys ordered to be paid are due.

Horace Lloyd and *Rosher*, in support of the rule. The official liquidator, in the case of a winding-up by the Court, makes out the list of contributories, but it is the duty of the Court to settle it. By the 8th clause of s. 133, this duty devolves upon the liquidator in the case of a voluntary winding-up. In so doing, the liquidator is exercising a judicial function, and, according to the first principles of justice, a party who is to be affected by it ought to have notice and an opportunity of being heard. By the 29th of Chancery Rules, 1862 (2), it is provided that "the official liquidator shall, with all convenient speed after his appointment, or at such time as the judge shall direct, make out and leave at the chambers of the judge a list of the contributories of the company; and such list shall be verified by the affidavit of the official liquidator, and shall, so far as is practicable, state the respective addresses of, and the number of shares or extent of interest to be attributed to each such contributory, and distinguish the several classes of contributories; and such list may from time to time, by leave of the judge, be varied or added to by the official liquidator." And the 30th rule provides that, "upon the list of contributories being left at the chambers of the judge, the official liquidator shall obtain an appointment for the judge to settle the same, and shall give notice in writing of such appointment to every person included in such list, and stating in what character and for what number of shares or interest such person is included in the list; and, in case any variation or addition to such list shall at any time be made by the official liquidator, a similar notice in writing shall be given to every person to whom such variation or addition applies. All such notices shall be served four clear days before the day appointed to settle such list or such variation or addition." If the liquidator under a voluntary winding-up is not bound to give notice, he will be exercising larger powers in this respect than either the official liquidator or the Court possesses in the case of a winding-up by the Court. This is clearly a matter on which there

(1) Ante, p. 179.

(2) 32 L. J. (Ch.) 4. 8 Jur. N. S. 912, 516

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should be a right of appeal: *Ex parte Clarke* (1): and consequently one of which the party was entitled to have notice: *Re Bridport Old Brewery Company.* (2)

BOVILL, C.J. In this case an action has been brought for a call made by the liquidator of a company which is being wound up voluntarily, upon the defendant, who is on the list of contributories. A verdict was found for the plaintiffs; and the defendant has contended before us that he had a good defence to the action, because he received no notice that his name was on the list of contributories, and therefore had no opportunity of contesting his liability to be so charged. The simple question, therefore, is, whether the absence of notice affords a defence to the action. I am of opinion that it does not. I find no clause in the Companies Act, 1862, which requires such a notice to be given. But it is contended that, inasmuch as notice is required where the company is being wound up by or under the supervision of the Court, by parity of reasoning it ought to be given where the winding-up is voluntary. There is, however, throughout the act, as we had occasion to observe when the demurrer in this case was argued before us, a manifest distinction between the voluntary winding-up and the winding-up by the Court or under its supervision. In the latter case, the notice is required by the Chancery Rules, and not by the act; from which it may be assumed that but for those rules no notice would be necessary even there. We are in effect asked to read the act as if the requirements contained in the rules referred to were incorporated in it. I cannot assent to that proposition. There is a very great distinction between the settling the list of contributories and the making of calls in the case of a winding-up by the Court, and the settling the list and making calls in the case of a voluntary winding-up. In the former case, an order made upon a contributory under s. 101 for a call is, subject to the provision for appeal, made conclusive evidence that the money is due. In the latter, the list of contributories settled by the liquidator is by the express provision of the 8th clause of s. 133 made only primâ facie evidence of the liability of the persons named therein to be contributories. Again, in a

(1) 2 De G. & J. 245. (2) Law Rep. 2 Ch. Ap. 191.

4 Jur. N.S. 800

winding-up by the Court, an order for a call may be enforced by execution: s. 120; whereas, in the case of a voluntary winding-up, the payment of a call can only be enforced by action. That affords an additional reason why notice should be required in the one case, and not in the other. The principle of making the list primâ facie evidence of liability is not confined to the list of contributories. It applies also to the making of the list or register of shareholders; and nobody has ever contended that in that case a notice was necessary under the former acts relating to joint stock companies. In the case of the register, there is power to amend or rectify any error in it. In the case of the list of contributories, s. 133, clause 8, enables the liquidator to exercise all the powers thereinbefore (s. 98) given to the Court of settling the list. When the list is settled by the Court, the Court has power to amend and alter it. If, then, the liquidator, in the case of a voluntary winding-up, may exercise the powers given to the Court, he has power to rectify errors in the list. If a person has been placed improperly on the list of contributories, he may apply to the liquidator for redress, and, failing that, he has power to apply to the Court, and eventually he may raise the question in an action for a call. He has abundant opportunity, therefore, to raise any objection he might have to urge, for the purpose of shewing that he is not a person who ought to be made liable as a contributory. It has been urged that justice requires that notice should be given. That depends upon the general scope of the act of parliament. The Lord Chancellor, when he framed the Rules of 1862, evidently thought a rule necessary to entitle the contributory to notice even under a winding-up by the Court. In my opinion, therefore, the fact that no notice was given in this case is no defence to the action. The Master of the Rolls seems to have taken the same view in *Re London Bank of Scotland.* (1) I desire not to be understood as saying that the liquidator in a voluntary winding-up should in no case give notice. As a matter of course, he would give notice of his intention to settle the list; and, in making out the list, he would probably think it right in his discretion to give notice wherever there was fair and reasonable doubt. I can well understand that there may be cases in which

(1) 2 W. N. 114.

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it would be unreasonable to require notice; as, for instance, where the register appeared to have been kept regularly for a series of years, the liquidator would assume that persons whose names were found there were properly placed there, and adopt it without hesitation. If any contributory has reason to complain of the conduct of the liquidator, he may apply under s. 141 for his removal. Practically, therefore, the legislature has provided ample safeguards against injustice. I think the rule should be discharged.

KEATING, J. I am entirely of the same opinion. I was at first much struck by the argument that, though the statute does not absolutely require a notice, it would be contrary to justice that a party should be placed upon the list of contributories without having had an opportunity of shewing that his name ought not to be there. But I think that argument is disposed of by the observations of my Lord as to the different effect given by the act to the settlement of the list by the liquidator and the settlement by the Court. I therefore agree in thinking that the absence of notice in this case is no answer to an action for a call. Here the judgment of the Court stops. But this construction does not necessarily dispense with the prudence of giving notice, where justice requires it and it may be done conveniently.

MONTAGUE SMITH, J. I am of the same opinion. Upon the true construction of the statute, I think notice to a contributory is not a condition precedent to his name being placed on the list by the liquidator, so as to render the list invalid for the purpose for which it is put forward, viz. as primâ facie evidence. The liquidator, no doubt, is intrusted with the performance of many acts involving an exercise of judgment and discretion; and I must confess I have felt some doubt whether the universal principle, that, where a person or a public body is invested with powers of a judicial character, they shall not be exercised without the party to be affected having an opportunity of being heard, ought not to be applied to this case. But, on looking at the general scope of the act, and carefully examining its various provisions, I have come to the conclusion that the legislature did not intend that the liquidator appointed under a voluntary winding-up should act so

much in the character of a judge or quasi judge as in that of a person acting in the capacity of an agent for the company, to do what they themselves might do if not winding up. The liquidator is impowered to settle the list of contributories; but he is not in terms required to give any notice to the persons whose names he is about to place upon it. The scheme of the act seems to assume that he may do so. There is no absolute necessity for notice; the party may always contest the propriety of his being made a contributory in an action, by shewing that in truth he never was a shareholder, or that he had ceased to be so. The list of contributories is very much like the register of shareholders under former acts, which was made primâ facie evidence against the party, though it might have been signed and sealed when he was not present, and without his being called upon. The legislature seems to have invested the liquidator with most of the powers of the directors and shareholders at a meeting. No injustice certainly has been done in this case, because the defendant was proved to have been upon the register of shareholders of the company. I entirely agree with my Lord, that, except in the plainest cases, it would obviously be the duty of the liquidator to give notice to persons whose names he is about to place on the list. Though not obligatory, it is proper and convenient that he should do so.

BOVILL, C.J. My Brother Willes, who was obliged to leave the Court, desired me to say that he concurs in this judgment.

Rule discharged.

Attorneys for plaintiffs: *Harcourt & Macarthur.*
Attorney for defendant: *G. C. James.*

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Jan. 14.

DRACACHI *v.* THE ANGLO-EGYPTIAN NAVIGATION COMPANY.

Bill of Lading—Indorsement—Evidence of Property in the Goods in Indorsee—18 & 19 *Vict. c.* 111, *s.* 1.

40 B. 494
8 Ch 18

In an action upon a bill of lading by an indorsee against the shipowners, for not delivering the goods, the plaintiff put in the bill of lading, and proved that the consignors had indorsed and delivered it to A., and that A. had indorsed and delivered it to the plaintiff for value:—

Held, evidence to go to the jury of such an indorsement and delivery of the bill of lading as to vest the property in the goods in the plaintiff; and so to transfer to him the right of action, under 18 & 19 Vict. c. 111, s. 1.

Declaration upon a bill of lading, by which the defendants promised Asher & Co. to deliver certain goods at Alexandria, with the usual exception of the act of God, &c.: averment, that Asher & Co. indorsed the bill of lading to Apostolo, and that Apostolo indorsed it to the plaintiff, to whom the property in the goods thereby passed; breach, that the goods were not delivered to the plaintiff, although the defendants were not prevented from so doing by any of the excepted perils.

Plea (amongst others), that the property in the goods in the bill of lading mentioned did not pass to the plaintiff by the said indorsements. Issue thereon.

At the trial before Montague Smith, J., at the sittings in London after last Term, the plaintiff proved that the bill of lading declared on was indorsed in his presence by Asher & Co., and delivered to Apostolo, who indorsed and handed it over to him, the plaintiff, for a valuable consideration.

It was submitted on behalf of the defendants that the mere proof that the bill of lading was so indorsed and handed over was not evidence of such an indorsement as would pass the property in the goods, and to give the plaintiff the right of action under s. 1 of the Bills of Lading Act. (1)

(1) 18 & 19 Vict. c. 111, s. 1, enacts that "every consignee of goods named in a bill of lading, and every indorsee of a bill of lading to whom the property in the goods therein mentioned shall pass upon or by reason of such consignment or indorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods, as if the contract contained in the bill of lading had been made with himself."

The learned judge overruled the objection; and a verdict was thereupon entered for the plaintiff for 490*l*.

Watkin Williams moved for a new trial, on the ground of misdirection. There is a distinction recognized by the Bills of Lading Act (1) between an indorsement of a bill of lading which will and an indorsement which will not pass the property in the goods therein mentioned. The mere fact of indorsement, therefore, is not even primâ facie evidence that the property was intended to pass. An indorsement to a wharfinger, for instance, to enable him to obtain delivery of the goods, does not pass the property.

[BOVILL, C.J. If there be nothing to raise the presumption of agency, is it not for the jury to say whether or not the property passed?]

The subject is elaborately discussed in Blackburn's Contract of Sale, p. 279, where it is said that "the authorities now seem to establish that the mere assignment of the bill of lading does not confer on the assign any legal right either of property or possession in the goods. It confers upon him an authority to receive the goods, and that authority may, as a matter of evidence, go very far to shew that the person who has got it has also acquired a right of property and possession in the goods; but, unless there be such a bargain as would, independently of the assignment of the bill of lading, give an interest in the goods, the assignee of the bill acquires no interest in the goods." The learned author refers to the well-known case of *Lickbarrow* v. *Mason* (2); and at p. 288, he says: "The decisions subsequent to *Lickbarrow* v. *Mason* (2) shew that the holder of a bill of lading, if he has no interest in the goods nor authority from the real owner to sell an interest in them, cannot (in cases to which the factors acts do not apply) give to his indorsee any title to the goods, although the indorsee has bonâ fide given value for the indorsement of the bill of lading. In this respect a bill of lading is unlike a bill of exchange, and can scarcely be properly called negotiable at all. And the weight of the authorities is also that an indorsement of a bill of lading does not by itself primâ facie confer any legal right

(1) 18 & 19 Vict. c. 111, s. 1.

(2) 2 T. R. 63; in error, 1 H. Bl. 357; 6 East, 20, note.

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of possession, or anything more than an authority on the indorsee; though an indorsement of the bill of lading in furtherance of such a bargain, as of itself confers an interest in the goods, does on behalf of a bonâ fide indorsee operate as an actual delivery of the possession would have done, and so renders that interest indefeasible by the original vendor's stoppage in transitu. To that extent the bill of lading is negotiable; but the mere indorsement of the bill of lading, not in furtherance of a bargain, is not equivalent to a delivery of possession, even as against a wrong-doer." In *Waring* v. *Cox* (1) Lord Ellenborough says: "No case has gone so far as to decide that a bill of lading is transferable like a bill of exchange, and that the mere signature of the person entitled to the delivery of the goods primâ facie passes the property in them to the indorsee. Much confusion has arisen from similitudinary reasoning upon this subject. There must be value upon the indorsement of a bill of lading, or no property in the goods is thereby transferred." *Coxe* v. *Harden* (2) is to the same effect substantially. There was no evidence in this case to shew the connection between Asher & Co. and Apostolo. Where the plaintiff leaves the evidence equally consistent with either view, the defendant ought not to be called upon to rebut it: *Metcalfe* v. *London, Brighton, &c., Railway Company.* (3)

BOVILL, C.J. I am of opinion that there is no ground for a rule. The evidence shews that the bill of lading was in the possession of Apostolo, to whom it had been delivered with an indorsement by Asher & Co., the consignors, and that Apostolo indorsed and delivered it to the plaintiff for value. I think that was strong primâ facie evidence to shew that the property in the goods passed to the plaintiff. The principles laid down in my Brother Blackburn's book seem to me rather adverse to the argument of Mr. Williams. I should be extremely reluctant to intimate the slightest doubt, where there is no evidence of fraud.

WILLES, J. I am of the same opinion. This is not the case of a person merely producing a bill of lading with an indorsement,

(1) 1 Camp. at p. 370.
(2) 4 East, 211.
(3) 4 C. B. (N.S.) 311; 27 L. J. (C.P.) 333. 4 Jur. N.S. 487.

and nothing more. It was proved that the bill of lading was indorsed to Apostolo, he being a person likely, for anything that appeared, to have the bill of lading in his possession in the course of business; and it was further proved that Apostolo indorsed it over to a respectable person for value. We have, therefore, not merely an indorsement and delivery of the document by one man of business to another man of business; but we have also the fact that the indorsee was doing that which would amount to a fraud if he had no right to do it. And there is no suggestion by anybody that a fraud has been committed. The case, therefore, does not stand upon the mere production of an indorsed bill of lading; though with that alone I have seen numerous cases launched at nisi prius without objection.

KEATING, J. I am of the same opinion. If there had been no indorsement for value to the plaintiff, and the indorsement relied on had been the indorsement to Apostolo, Mr. Williams's point would have arisen; though I do not say that even then it would have been a tenable one. Here, however, the action is brought by an indorsee for a valuable consideration from Apostolo. I think there is clearly no ground for saying that there was not at least evidence for the jury that the property in the goods passed to the plaintiff.

MONTAGUE SMITH, J., concurred.

Rule refused.

Attorneys for plaintiff: *Huson & Parker.*
Attorneys for defendants: *Cotterill & Sons.*

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Feb. 5.

CROPPER and Another *v.* COOK and Another.

Usage of Trade—Wool-Broker—Principal and Agent.

A usage in the wool trade in Liverpool, that, when a broker is employed to buy wool, he may either contract in the name of his principal, or, at the request of the seller, may (without communicating the fact to his principal) make himself personally responsible for the price:—

Held, a good and reasonable usage.

The plaintiffs, trustees under a deed of assignment and release under the Bankruptcy Act, 1861, between one E. H. Hodgson of the first part, the creditors of Hodgson of the second part, and the plaintiffs as trustees of the third part, sued the defendants for money lent, money received, and money found due on accounts stated with Hodgson before the execution and registration of the deed, and for money found due on accounts stated with the plaintiffs as trustees.

Pleas: 1. That the plaintiffs were not trustees, nor were the alleged causes of action vested in them as such trustees. 2. Never indebted. 3. As to the causes of action alleged to have accrued before the execution and registration of the deed, a set-off for money due to them from Hodgson before the execution and registration of the deed, for goods bargained and sold, work done, &c. Issue thereon.

At the trial before Montague Smith, J., at the last summer assizes at Liverpool, the following facts appeared in evidence:—Hodgson was formerly a merchant carrying on business in Liverpool under the style or firm of Hodgson, Mather, & Co. The plaintiffs were the trustees appointed under a deed of assignment for the benefit of Hodgson's creditors, dated the 10th of September, 1866, and duly registered. The defendants were wool-brokers carrying on business in London and Liverpool under the style or firm of Bradbury & Cook. In November, 1863, and February, 1864, the defendants purchased on account of Hodgson, Mather, & Co., a quantity of Donskoi wool, payment for which was made to the defendants, about one-fourth in cash, and Hodgson, Mather, & Co.'s acceptances for the balance. These acceptances were from time to time renewed until the sale of the wool, which took place

in December, 1864, at a loss upon the invoice: but, after crediting Hodgson, Mather, & Co. with the cash payments, a balance of 1880*l.* 14*s.* 10*d.* remained due from the defendants to Hodgson, Mather, & Co. upon this transaction.

In August, 1864, the defendants purchased from Rodoconachi, Sons, & Co., on account of Hodgson, Mather, & Co.,—the defendants acting in the transaction as brokers for both parties,—about 1200 bags of Donskoi wool, to arrive per *Stamboul*. The bought-note sent to Hodgson, Mather, & Co. was as follows:—

"Liverpool, 2nd August, 1864.

"Bought of Messrs. Rodoconachi, Sons, & Co., for account of Messrs. Hodgson, Mather, & Co., about 1200 bags of Donskoi wool, at as under per lb., to arrive per *Stamboul* now at Taganrog loading or about loading, say, about 1050 bales washed white Donskoi, at 13¼*d.* per lb., about 150 bales washed black and grey, at 10½*d.* per lb.; the washing of Messrs. Rodoconachi, Sons, & Co.'s agents, of Rostaff. The wool to be taken as it is, without any allowance except for sea-damage or entire bales of black, grey, or locks. To be delivered in London or Liverpool, at option of buyers. Destination to be declared in time before ship's arrival at Malta for orders. Customary allowances. And to be paid for by cash (before delivery, if required,) within fourteen days from finishing of housing, less ½ per cent. discount. Brokerage ½ per cent.

(Signed) "Bradbury & Cook."

A sold-note was at the same time sent by the defendants to Rodoconachi, Sons, & Co., with the names of Hodgson, Mather, & Co. as the buyers. Rodoconachi, Sons, & Co., however, declined to accept Hodgson, Mather, & Co., as buyers. The defendants thereupon sent them another sold-note describing the wool as "sold to *our principals* for account of Messrs. Rodoconachi, Sons, & Co."

On the 24th of October, 1864, Hodgson, Mather, & Co. stopped payment; and the wool was afterwards sold at a loss. The defendants paid the price of the wool to Rodoconachi, Sons, & Co.

It did not appear that the defendants had any express authority from Hodgson, Mather, & Co., to make the contract in their own names, or that Hodgson, Mather, & Co. knew that they had done so: but they relied on a well-known usage in the wool trade at

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Liverpool for the broker to make himself personally responsible where, as here, the seller objected to the proposed buyer, the broker giving the name of the principal in the one note and not in the other, as was done upon this occasion.

To prove this alleged usage, several witnesses, wool-brokers and merchants, were called, all of whom stated that there was a well-known practice in the wool-market at Liverpool for the broker, at his discretion, to give the name of his principal in the sold-note to the vendor or to make himself personally responsible without giving his principal's name: and one of them stated that the Greek merchants would only take the broker's name.

Hodgson, who was called, stated that he believed it occasionally happened, but very seldom, that the broker made himself personally liable to the vendor, but that this was done only with the authority of the principal, which he denied having given in this case.

For the plaintiffs it was objected that evidence of the supposed usage was not admissible, and, if admissible, that the evidence given was not sufficient to establish it; and that, the payment to Rodoconachi, Sons, & Co., not having been made with the sanction of Hodgson, Mather, & Co., the defendants were not entitled to set it off against the balance due from them to Hodgson, Mather, & Co.'s estate.

The learned judge overruled the objection; and he left it to the jury to say whether there was such a usage as alleged,—telling them that to make it legal it must be well known, consistent, and intelligible; and that, if they found the usage proved here, it was that the broker might make himself personally responsible to the vendor without communicating that fact to his principal.

The jury found the usage proved. A verdict was thereupon taken for the defendants, leave being reserved to the plaintiffs to move to enter a verdict for them for 1880*l.* 14*s.* 10*d.*, if the Court should be of opinion that the evidence was not such as ought to have been left to the jury.

Quain, Q.C., in Michaelmas Term last, accordingly obtained a rule nisi, on the ground that the evidence of the custom was not admissible, and, if admissible, not sufficient to establish it.

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T. Jones, Q.C., and *Herschell*, shewed cause. The simple question is whether the payment made by the defendants to Rodoconachi, Sons, & Co., was made with the authority, express or implied, of Hodgson, Mather, & Co.; and that depends upon whether or not the defendants were justified in making the contract for the purchase of the wool in their own names. The evidence was that there is a custom in Liverpool, well known to all who deal with wool-brokers there, that, when a broker is employed to buy wool, he may mention his principal's name in the sold-note, or he may, at the request of the vendor, exclude all mention of the principal's name, and that without any express authority from his principal, or without informing him of the fact. The jury found the custom proved.

Quain, Q.C., and *R. G. Williams*, were called upon to support the rule. The payment made by the defendant to Rodoconachi, Sons, & Co. was not made with the authority of Hodgson, Mather, & Co. They had a right to rely upon the bought-note delivered to them as expressing the terms of the only contract which they authorized the defendants to make for them. The defendants had no right to alter Hodgson, Mather, & Co.'s position by contracting with the sellers in a form different from that which they had done with the buyers.

[WILLES, J. I think the argument must go the length of saying that the variance made the contract null and void.]

Any alteration in the terms of the contract should have been communicated to the buyers. A custom to do this behind the back of the principal cannot be good. Besides, there was no pretence for saying that the alleged usage was uniform or certain: it was at the option of the seller only.

[WILLES, J. It is only necessary to state the entire contract as between the principals. That which only affects the interest or the liability of the broker need not appear.]

This variance between the bought and sold-note was one which might most materially affect the interest of the buyers, in the event, for instance, of a rise in the market and the failure of Messrs. Rodoconachi, Sons, & Co.

WILLES, J. I am of opinion that the set-off claimed in this

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case was admissible, and that the verdict was properly entered for the defendants. The case was very ingeniously put on the part of the plaintiffs, as to the effect of the transaction in a possible event. I will not, therefore, lay it down as a general proposition that a person employed as broker to buy goods for a principal has an implied authority to buy in his own name or in that of his principal, at his option. I found my judgment in this case upon the fact that there was a known usage in the wool trade in Liverpool, found by the jury, and upon sufficient evidence, by a verdict which is not unsatisfactory to the judge who tried the cause, according to which usage a broker employed to buy wool sometimes gives a sold-note in which the buyer's name is mentioned and sometimes without mentioning it; in the former of which cases any right of set-off would accrue between the seller and the buyer exclusively, and in the latter the broker would be liable if the seller thought fit to charge him as principal. The objections to the application of such a custom in this case are two-fold; first, because it is supposed to effect some alteration in the contract; secondly, because it is said to lead to the contract being void by reason of a variance between the bought-note and the sold-note, or of a misrepresentation by the broker to the buyer of what he had done with the seller. As to evidence of the custom not being admissible under such circumstances, I can hardly bring my mind to doubt its admissibility and its applicability. By the well-known and recognized rule of the stock-exchange, acted upon in *Taylor* v. *Stray* (1) and numerous other cases, where buyer and seller may or may not both be acting for a principal, though no principal is named, yet it is held that, notwithstanding that as between members of the stock-exchange among themselves all are principals, the parties on whose behalf the contract is made may sue each other upon it. I merely mention that as a familiar illustration; but it is not exactly this case, because here the custom appears to be that the broker may at his option deal in his principal's name or make himself liable personally. I was going to refer from my recollection of the cases to the tallow trade; but that has a special and exceptional usage, and therefore I take the

(1) 2 C. B. (N.S.) 175; 26 L. J. (C. P.) 185; in error, 2 C. B. (N.S.) 197; 26 L. J. (C. P.) 287. 3 Jur. N.S. 560, 964.

usage of the stock-exchange as being more familiar. With respect to the buyer, two considerations arise. In the first place, it may be material to the broker to conceal from the seller the buyer's name, though the same reason may not exist for concealing the name of the seller. The custom may therefore be a reasonable one, apart from the next view. In the second place, it is not unusual for the seller to require a guarantee. It is a common practice to give a del credere commission. A seller has even been held entitled by usage to hold his own agent liable as a principal for not disclosing the buyer's name within a reasonable time. There seems, therefore, to be no reason for holding a custom of this kind to be necessarily indivisible, or that there may not be such a custom limited in its application to the buyer's broker. For these reasons, I entertain no doubt whatever that such a custom is admissible, and that it is applicable to such a contract as this.

Then comes the second head of objections, one of which goes to the substance of the contract, and the other only to the form in which it is expressed. The first is, that, as between Rodoconachi & Co. and the defendants, the brokers, the latter only are the persons liable upon the contract, and that the buyers are no parties to it. That is an objection arising upon the facts: and, on hearing the report of the learned judge who tried the cause, I must confess I am not so impressed by the facts as to induce me to reject from the sold-note the words "sold to our principals," which announced to Rodoconachi & Co. that the brokers had principals, and bound them to those principals, and gave them a recourse against them, if the sellers chose to proceed against them instead of against the brokers. The evidence does not shew, contrary to the written document, that it was not a sale by and to principals. The rule of law as to principals undisclosed is clear. Parol evidence may be given to establish the right or liability of an undisclosed principal; but not for the purpose of excluding the liability of a person named in the contract: *Higgins* v. *Senior*. (1) The objection of substance therefore fails. Then comes the objection of form. It is said that there is a variance between the bought and the sold-note. Now, the variance must be material or not either with reference to the

(1) 8 M. & W. 834.

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provisions of the Statute of Frauds because there is no contract ad idem, or because it shews that the authority has not been followed, it being coupled with a condition which has not been performed. As to the Statute of Frauds, it is unnecessary to do more than to state that Rodoconachi & Co. are the principals on the one side and Hodgson, Mather, & Co., on the other; and the bought-note correctly states this. The sold-note runs thus:—"Sold to *our principals* for account of Messrs. Rodoconachi, Sons, & Co.:" so that the names of the sellers appear in both. The buyers also are described in both, though not mentioned by name in the sold-note. Being referred to, however, parol evidence was admissible to shew who they are; and that would establish that they were Hodgson, Mather, & Co. That the principals are not named but only described in the sold-note, and are named in the bought-note, therefore, is no objection on the Statute of Frauds. Consequently, it must be upon the remaining ground, if any, that the contract is to be held to be a contract upon which the brokers cannot rely, viz. that, though they have given the sellers a note upon which they may themselves be liable personally, they have not disclosed that to the buyers. That reduces it to a question of authority. If that be a damage and injury to the principals which the agents were bound to avoid, it must be because the agents had no authority so to contract. But the fact of authority is supplied by proving that the contract was made in a market where it is usual for the agents, under circumstances which may from time to time arise, to contract in the manner in which the defendants have contracted in this case; and the principals, knowing of the existence of the custom, or not choosing to inquire about it, must be bound by it. It seems to me that evidence of the custom was admissible, and that it disposes of the case.

7 H & N 808

KEATING, J. I am quite of the same opinion. Hodgson, Mather, & Co., employed the defendants, as brokers, to purchase wool for them according to the usage of the wool-market at Liverpool, which was known to all the parties. That usage is, that the broker has a discretion either to confine the liability to his principal, or to add thereto his own personal liability, without communicating to his principal that he has done so. The de-

fendants have made a contract in accordance with that custom. It must be assumed that they did so with the authority of Hodgson, Mather, & Co. It is said that this is not so, because, by the bought-note which they delivered to their principals, the defendants have represented to them that they (the principals) only were liable for the price of the wool. That, however, as it seems to me, does not affect the contract, which was made according to the usage, and binds the principals. The set-off, therefore, must be allowed.

MONTAGUE SMITH, J. I am of the same opinion. The authority of the broker varies in different trades and different markets. Proof of such usages is common and notorious. The jury here have found that there is a well-known usage in the Liverpool wool-market for brokers sometimes to contract in the names of their principals, without making themselves personally liable, and sometimes to contract so as to add their personal liability to that of their principals; and I cannot say that I am at all dissatisfied with the verdict. It seems to me that it is entirely consistent with the evidence, and establishes a reasonable and intelligible course of business. The only other question is, whether the defendants, who bought the wool for Hodgson, Mather, & Co., are deprived of their right of setting off the price which they were called upon by the sellers to pay, by reason of their having sent in to their principals a bought-note in the form they did, differing in the way which has been pointed out from the sold-note which they sent to Rodoconachi & Co. It seems to me that they are not so precluded. The utmost effect of it would be that Hodgson, Mather, & Co., may have been misled as to the form of the contract. But it does not alter the substance of it, or in any way interfere with the authority before given to the defendants to contract according to the usages of the particular market, or with their liability, if any, for the consequences of their having so acted. It does not, however, appear that Hodgson, Mather, & Co., sustained any loss or detriment from the form in which the contract was made.

Rule discharged.

Attorneys for plaintiffs: *Chester & Urquhart.*
Attorneys for defendants: *Sharpe, Parkers, & Pritchard.*

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Feb. 6.

HENDERSON *v.* THE MOSTYN COPPER COMPANY, LIMITED.

Letters-Patent—Construction of Grant of Licence—Notice of Infringement—Suspension of Royalties.

The plaintiff, being possessed of a patent, granted to the defendants the exclusive licence to work it in a certain district, by a deed by which the latter covenanted to pay certain royalties, and to give every information the better to enable the patentee to support the letters-patent; and the patentee covenanted for quiet enjoyment of the patent by the defendants, and that, "in case any person should work the patented processes, the patentee would at his own costs commence and carry on all such actions, &c., as should be necessary to establish the validity of the patent, and to put a stop to the working of the patented processes by such person; and that, in case the patentee should fail or neglect so to establish or maintain the validity of the patent, and to put a stop to the working of the patented processes by such other person, he (the patentee) would not call upon the defendants, nor should the defendants be liable thenceforth to pay any royalty, until the patentee should by authority of law or otherwise have restrained such person from working under the letters-patent:"—

Held, that the condition for suspension of payment of the royalties did not come into operation until the patentee had notice of an infringement, and until after the lapse of a reasonable time to allow him an opportunity of instituting proceedings to restrain it.

THE declaration stated that, by an indenture made between the plaintiff of the one part and the defendants of the other part, it was declared that the plaintiff was the proprietor of certain patents for improvements in the method of extracting metals from their ores; that the plaintiff by the said indenture gave and granted unto the defendants full and free licence, liberty, and authority to work the several processes as described in the several specifications relating to the said patents respectively, or any or either of them, except in so far as the separation and manufacture of antimony was concerned, in the concentration and extraction of metals from their ores or otherwise, and to erect and construct all necessary works and machinery within a certain district in the indenture mentioned; that, in consideration of the said licence, the defendants did by the indenture covenant with the plaintiff that the defendants would pay unto the plaintiff, as and by way of royalties, at the rate of 2*l.* 10*s.* for every ton of fine copper sold and delivered from the works by them the defendants, and manufactured by the patented processes or any of them, free of all

deductions, and that they the defendants would keep a just and true account in writing of deliveries from the works of all copper so extracted, whether such copper should be delivered in a fine state or otherwise, and should, within one calendar month after the end of each quarter of a year during the continuance of the licence, deliver to the plaintiff a true copy of such account up to and including the last day of the then preceding quarter, shewing the copper or other metals extracted during the then last preceding quarter, and further that they the defendants thereafter during the continuance of the licence would give every information to the plaintiff to enable him to support, uphold, and retain the said letters-patent and the rights and privileges thereby granted: General averment of performance of all conditions precedent: Breach, that, although the defendants sold and delivered from the works large quantities of fine copper extracted and manufactured by the said patented processes or some or one of them, they did not pay the plaintiff, as and by way of royalties, at the rate of 2*l.* 10*s.* for every ton thereof so extracted and manufactured; that they did not keep a just and true account of deliveries from the works of the copper so extracted and manufactured; that they did not within one calendar month of the quarter ending the 25th of March, 1867, deliver to the plaintiff a true copy of such account; and that although, during the continuance of the licence, the defendants alleged to the plaintiff that certain persons, to wit, the Runcorn Alkali Company, had commenced to work the plaintiff's patented processes, the defendants did not nor would during the continuance of the licence, or at any time, give to the plaintiff information which they reasonably could and might and ought to have given, to enable him to support, uphold, and retain the letters-patent and the rights and privileges thereby granted, &c.

There was also an indebitatus count for royalties in respect of the use by the defendants, with the plaintiff's permission, of certain patented processes of the plaintiff, a count for interest, and a count upon an account stated.

Pleas: 1. Non est factum. 2. To the first count, that, during the continuance of the licence, the Runcorn Company commenced and continued to work, and still continued to work, certain

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of the plaintiff's patented processes, and that, although the plaintiff had due and sufficient notice and knowledge that the Runcorn Company had commenced and were continuing to work certain of the plaintiff's patented processes, and although the defendants had given to the plaintiff such information as they reasonably could and might give to enable him to support, uphold, and maintain the letters-patent, and had done all things for that purpose which they could and ought to do, yet the plaintiff during the continuance of the licence had failed and neglected to establish the validity of the letters-patent and to put a stop to the working of certain of the patented processes by the Runcorn Company; that the royalties in the first count mentioned were royalties in respect of copper manufactured by the defendants after the Runcorn Company had commenced to work and whilst they were working certain of the said patented processes, and after the plaintiff had failed or neglected by authority of law or otherwise to put a stop to the working of such patented processes by the said Runcorn Company and to restrain them from working under the said letters-patent; and that the defendants had kept due account of all royalties, as required by the indenture. 3. To the second and third breaches, that the defendants did keep just and true accounts of deliveries of copper ore from their works, and did deliver to the plaintiff true copies of such of the said accounts as they were required by the indenture to deliver to the plaintiff. 4. To the residue of the declaration, never indebted. Issue thereon.

The cause was tried before Kelly, C.B., at the last summer assizes at Chester. It appeared that the plaintiff was the proprietor of certain patents for improvements in the method of extracting metals from their ores; and that by an indenture bearing date the 1st of April, 1865, between the plaintiff of the one part and the Mostyn Copper Company, Limited, of the other part, reciting that the plaintiff was the proprietor of certain patents (describing them), the plaintiff, in consideration of the royalty thereinafter agreed to be paid, gave and granted unto the Mostyn Copper Company and their successors full and free licence, liberty, and authority to work the several processes as described in the several specifications relating to the said patents respec-

tively, or any or either of them (except in so far as the separation and manufacture of antimony was concerned), in the concentration and extraction of metals from their ores or otherwise, and to erect and construct all necessary works and machinery therefor, within a specified district. In consideration of this licence, the company covenanted to pay the plaintiff, his executors, &c., as and by way of royalties, at the rate of 2*l.* 10*s.* for every ton of fine copper, and 4*d.* for every ounce of silver, sold or delivered from the works, and manufactured by the patented processes, or any or either of them, free of all deductions; and that they and their successors would keep a just and true account in writing of deliveries from the works of all copper so extracted, whether such copper should be delivered in a fine state or otherwise, &c., and should within one calendar month after the end of each quarter of a year during the continuance of the said licence deliver to the plaintiff, his executors, &c., a true copy of such account up to and including the last day of the then preceding quarter, shewing the copper or other metals extracted during the then last preceding quarter, and would, upon such accounts being agreed to and approved, pay the plaintiff, his executors, &c., all royalties due thereupon to him or them, and, in the event of the same not being paid within one month after the expiration of the quarter, it should be lawful for the plaintiff, his executors, &c., to enter and distrain for the amount due, as for rent in arrear,—with power to the plaintiff to enter to inspect the books and works. The indenture then proceeded as follows:—

"And further that they the said company and their successors will at all times hereafter during the continuance of this licence give every information the better to enable the said W. Henderson, his executors, &c., to support, uphold, and retain the said letters-patent and the rights and privileges thereby granted as aforesaid: And the said W. Henderson, for himself, his heirs, &c., doth hereby covenant with the said company and their successors, that he the said W. Henderson, his executors, &c., will at all times during the continuance of this licence, furnish the said company and their successors with all and every information which they may require, and which he the said W. Henderson, his executors, &c., shall have power to give, both by permitting them to inspect

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any manufactories or works which he or they may have the control of or have power to shew to them, or otherwise; and also that, in the event of his making any further improvements in the treatment of copper and silver ores, and the method of extracting their metals therefrom, he will forthwith communicate the same to the said company and their successors, and they shall from thenceforth be impowered and authorized to use such improvements and discoveries, without being called upon to pay any further or additional sum by way of royalty for the same; and that he has not at any time heretofore granted, and will not at any time hereafter grant, any further or other licence to any person to work under his said patents, or any or either of them, within the district aforesaid, and for which this licence is granted: And further that he the said W. Henderson now hath good right and authority to grant the licence aforesaid, and that the same may be enjoyed by the said company and their successors without any hindrance and disturbance on the part of the said W. Henderson, his executors, &c.: And that, in case any person or persons shall at any time hereafter during the continuance of this licence work or attempt to work the said patented processes, or any of them, whether in the said district or elsewhere, the said W. Henderson, his executors, &c., will at his or their own costs commence, and carry on, or cause to be commenced and carried on, all such actions, suits, or other proceedings as shall be necessary or proper in order to establish and maintain the validity of the said letters-patent, and to put a stop to the working of the said patented processes, or any of them, by such person or persons; and that, in case the said W. Henderson, his executors, &c., shall fail or neglect so to establish or maintain the validity of the said letters-patent, and to put a stop to the working of the said processes by such other person or persons, then the said W. Henderson will not call upon the said company, nor shall they be liable thenceforth to pay any royalty in respect of the copper or other metal manufactured by them after the time of such other person or persons commencing to work the said processes, until the said W. Henderson, his executors, &c., shall by authority of law or otherwise have restrained such person or persons from working under the said letters-patent; but, in the meantime, the said company and their

successors shall keep due account of all royalties, to the intent that they may be paid to the said W. Henderson, his executors, &c., on the establishment and enforcement of such patent-right as against the person or persons so infringing."

Then followed a covenant for further assurance by Henderson, his executors and administrators, and every person claiming any right or interest in the letters-patent, or any of them, through or under him; and a proviso for forfeiture of the licence if the company should neglect to work the patented processes or to pay the royalties for the space of twelve months, &c.

All the royalties payable under this licence which became due up to the 31st of December, 1866, were duly accounted for and paid; but, in February, 1867, the defendants discovered, from common report, that the Runcorn Soap and Alkali Company were working certain of the processes mentioned in the licence, at their works at Runcorn, in the county of Chester. The defendants thereupon informed the plaintiff that the Runcorn Company were infringing his patents, and that they declined to pay any more royalties under the licence whilst the infringement was permitted to continue, and they required the plaintiff to establish and maintain the validity of the letters-patent; but no such information as the plaintiff could act upon was given to him until the 6th of May; and the plaintiff took no steps to put a stop to the alleged infringement until after the commencement of this action.

It was contended on the part of the defendants that the plaintiff was not entitled to the royalties while he permitted his patent-rights to be infringed by the Runcorn Company; and they proposed to prove the infringement.

The Lord Chief Baron, however, ruled that the plaintiff was entitled to recover, inasmuch as he was not in default until a reasonable time had elapsed after the plaintiff had notice of an infringement, to allow him an opportunity of instituting proceedings to restrain it, and that such reasonable time had not elapsed when the defendants refused to pay the royalties claimed; and he refused to receive evidence of infringement by the Runcorn Company. A verdict was thereupon entered for the plaintiff for the amount of the royalties claimed.

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Manisty, Q.C., in Michaelmas Term last obtained a rule nisi for a new trial, on the grounds of misdirection and the improper rejection of evidence.

Coxon (*Grove, Q.C.*, and *H. Giffard, Q.C.*, with him), shewed cause. Upon the true construction of the deed, there could be no such default on the part of the plaintiff as to entitle the defendants to a suspension of the royalties, pursuant to the condition, until there was a failure or neglect by him to take proceedings for an infringement of the patent within a reasonable time after he had notice of such infringement. No such failure or neglect is alleged in the second plea.

[WILLES, J., suggested that it would be more convenient to consider the plea as amended so as to raise the first question in the rule, and to assume that the Runcorn Company commenced working under the patent in February, and continued to do so until the royalties in question became due, and to the time of the action. This was assented to on both sides.]

The construction put by the Lord Chief Baron upon the deed is manifestly the true one. The word "thenceforth" in the condition means, from the time of the failure or neglect of the plaintiff to take proceedings against an infringer. There could be no such failure or neglect until the plaintiff received some definite information upon which he could act. None such having been given, the condition did not attach, and consequently the defendants have no answer to the claim for royalties.

Manisty, Q.C., and *M'Intyre*, in support of the rule. The true construction of the deed is, that, if an infringement takes place de facto,—a substantial infringement,—from the moment that infringement comes to the knowledge of either party, the payment of the royalties is to be suspended until proceedings can be taken by the patentee to establish the validity of the letters-patent; and, if he fails to establish their validity, the defendants' liability to pay royalties is absolutely to cease. The subject-matter which the parties are dealing with is the exclusive right to exercise the patent, in consideration of the payment of a certain royalty, which is to cease from the time of actual infringement by a third party. If no proceedings are taken to vindicate the patent, the suspension continues. If proceedings are taken, and the patentee fails to

establish the validity of the patent, no more royalties are to be payable from the time of infringement. If the construction contended for on the part of the plaintiff be correct, the plaintiff would continue to receive the royalties until he succeeded in suppressing the infringement.

[WILLES, J. Suppose an infringement has gone on for a year, and, neither party having any knowledge of the fact, the royalties have been paid for three quarters, and the infringement is discovered during the fourth quarter, but is discontinued before the expiration of the fourth quarter, so that there is no necessity for any proceeding to put a stop to it,—what becomes of the fourth quarter's royalties ?]

The company would probably in that case have to pay it.

[WILLES, J. That seems to shew that the plaintiff must have notice.]

Notice or knowledge would refer back to the commencement of the infringement.

WILLES, J. The question in this case turns entirely upon the construction of the covenant. We are relieved from any such technical question as whether, assuming the plea to have been a bad plea, enough was proved to make it out in terms. The sole question is whether, upon the true construction of the condition, the payment of the royalties by the company, who took the exclusive licence from the patentees, was to come to an end or be suspended upon the commencement of an infringement by any other person, and to continue so suspended, an account being kept of them in the meantime, until the patentee should have established his patent-right, and should have obtained an injunction restraining the infringer from any further violation thereof, or should, as Mr. M'Intyre put it, have brought matters to such a pass that the infringer was satisfied that he was in the wrong, and induced to desist from any further infringement, which probably it would be reasonable to read in, or, in other words, whether the commencement of the infringement (subject, of course, to the fact of the infringement being discovered, for, until an actual infringement capable of being proved happened, no action could be taken by the patentee) is to be taken as the time from which the sus-

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pension of payment of the royalties is to begin,—an infringement persisted in and not put an end to; or whether the true construction of the covenant is not that the suspension was to commence only upon the patentee being in default in commencing and prosecuting proceedings for the purpose of restraining the infringement; which would imply that the patentee should have reasonable notice of the infringement, so as to be able to take legal proceedings in respect of such infringement. That question is to be determined by the language of the condition for suspension, construed with reference to the preceding part of the deed.

Ordinarily speaking, there can be no doubt that, where a person undertakes to do an act in case a given thing is done by a third party (not a party to the contract), the person who contracts to act upon the thing being done is bound to take notice of its being done. If it is a thing to be done by one of the parties to the contract, the general rule is that he must give notice before he can call upon the other to perform his undertaking. Having this in his mind, the plaintiff's counsel very properly drew our attention to the matter introductory to the condition in question, whereby the company, who were to have the exclusive right to work the patent, covenant that they and their successors will "at all times hereafter during the continuance of this licence give every information the better to enable Henderson, his executors, &c., to support, uphold, and retain the said letters-patent, and the rights and privileges thereby granted." The company, therefore, seem to have taken upon themselves the onus of giving notice to the patentee of any infringement. Following that up, we find a covenant by the patentee, not to give or to take notice of every infringement, but that he, his executors, &c., will at all times during the continuance of the licence furnish the company with every information which they may require, and which he shall have power to give, by permitting them to inspect any manufactories or works which he may have the control of or have power to shew to them, or otherwise; and that, in the event of his making further improvements in the treatment of ores and the methods of extracting their metals therefrom, he will forthwith communicate the same to the company, and they shall from

thenceforth be impowered and authorized to use such improvements and discoveries without being called upon to pay any further or additional royalty. In short, the patentee contracts to give the company the whole benefit of his information in respect to the invention, both present and future. Then comes the ordinary covenant not to grant a licence to any other person, and a covenant for quiet enjoyment. The covenant for quiet enjoyment is that which introduces the condition in question: it commences in the usual form, that the subject of the grant may be enjoyed by the company and their successors without any hindrance or disturbance on the part of the grantor, his executors, &c.; and then it proceeds, "and that, in case any person or persons" (an extension of the ordinary covenant for quiet enjoyment) "shall at any time hereafter during the continuance of this licence work or attempt to work the said patented processes, or any of them, whether in the said district or elsewhere, the grantor, his executors, &c., will at his or their own costs commence and carry on, or cause to be commenced and carried on, all such actions, suits, or other proceedings as shall be necessary or proper in order to establish and maintain the validity of the letters-patent, and to put a stop to the working of the said patented processes or any of them by such person or persons."

So far it is a covenant. All that follows will be found to lie in condition; but it is a condition which follows upon and is an enforcement of, and, as it appears to me, gives a specific remedy for any breach of that covenant, or a final defeat of the patent. It will be necessary, therefore, before considering the effect of the condition, to see what must be made out before the grantor is shewn to have been guilty of a breach of that covenant. And, upon the true construction of the covenant, it appears to me that the grantor would not be liable to an action for a breach unless he were guilty of a neglect to bring and prosecute with effect and without delay an action or suit against persons infringing the patent. Taking the whole terms of the deed, it would be a strained and singular construction to hold that the grantor is to take proceedings on every petty infringement which may take place secretly, without any information from the company or any one else. I do not think that would be a reasonable construction of the covenant: and I

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assent to the argument of Mr. Coxon, that this is a case in which the ordinary rule is excluded by the nature of the subject-matter and the terms, or the fair inference from the terms, of the contract which the parties have entered into.

The first proposition which I lay down is, that the covenant would not be broken by the mere fact of an infringement having taken place, without reference to whether it was known to the patentee or not, and whether, if he had notice, it was one for which he might have taken proceedings to restrain it or not. Let us then see whether there is anything in the condition to make it attach earlier. The condition is,—"and that, in case the patentee, his executors, &c., shall fail or neglect so to establish and maintain" (that is, by such means as by his covenant he was bound to resort to) "the validity of the letters-patent, and to put a stop to the working of the said processes or any of them by such other person or persons" (which would take time, cause expense, and require notice of acts of infringement) "then" (that is, a condition is to attach upon, not before, the failure or neglect so to establish the validity of the letters-patent) "the patentee will not call upon the company, nor shall they be liable, thenceforth to pay, any royalty in respect of the copper or other metal manufactured by them" (and then come the words which raise the difficulty suggested on the part of the defendants), "after the time of such person or persons commencing to work the said processes, until the patentee, his executors, &c., shall by authority of law or otherwise have restrained such person or persons from working under the said letters-patent." It then proceeds,—"But, in the mean time" (now follow words which are relied on by the company as fortifying the inference they seek to draw from the words "commencing to work"), "the company and their successors shall keep due account of all royalties, to the intent that they may be paid to the patentee, his executors, &c., on the establishment and enforcement of such patent right as against the person or persons so infringing." Then follows a covenant for further assurance.

The question seems to turn upon the use of the words "after the time of such other person or persons commencing to work." Are we to read those words as controlling the words used in the covenant and in the introductory part of the condition, and making

the operation of the condition larger than the covenant and larger than that of the earlier part of the condition itself? It appears to me that that would be giving to the language of an accessory and subsidiary clause of the condition a greater effect than it ought fairly to bear. It would in effect be altering the earlier and operative part of the condition, framed with reference to the covenant, the meaning of which is plain, simply because of the use of the word "commencing." To construe the word "thenceforth" in the condition as referring to "the time of such person or persons commencing to work the said processes," would be to come to the conclusion which has already been rejected in construing the covenant, by reason of its inconsistency with the general scope of the deed, and would be disregarding the wholesome rule of construction by which words in a deed are to be construed with those which precede and those which follow them. I think the true meaning of the deed is, that the condition is not to attach unless there has been a breach of the covenant, and therefore not until there has been a failure or neglect to proceed, or a final failure of the proceedings taken; and that there can be no failure or neglect to proceed until the patentee has had reasonable notice of an infringement, and a reasonable time for taking proceedings to restrain the infringement has elapsed. This is the view which was adopted by the Lord Chief Baron at the trial. When the rule was granted, I felt considerable difficulty, looking at the part of the deed on which Mr. M'Intyre relied: but, after carefully considering the whole of this member of the deed, I think that the word "commencing" ought not to be taken as controlling the word "thenceforth," and, looking at the previous part of the instrument, and taking especially the expression of the principal obligation as being found in the covenant, I come to the conclusion that the ruling of the Lord Chief Baron at the trial was right, and consequently that the rule should be discharged.

KEATING, J. I am of the same opinion. It certainly is not very easy to construe this deed in a perfectly satisfactory manner: but, upon the whole, I am disposed to agree in the construction which my Brother Willes has put upon it. The plaintiff grants the company an exclusive licence to use his patent; and, for the

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purpose of protecting them in the exercise of the privilege so granted to them, he enters into a very stringent covenant to take proceedings to establish the patent and restrain infringements. In order further to protect the interests of the defendants, there is a proviso or condition that, in case of the plaintiff's failure so to establish the validity of the patent and restrain infringements, the payment of royalties shall be suspended. Such suspension is here claimed on the part of the defendants to have taken place. It is contended, that, when mere knowledge of an infringement occurs to either the patentee or the company, the payment of royalties is to be suspended until the patentee has established the patent-right by restraining the infringement, and that the suspension is to date from the commencement of the infringement. That would, as it seems to me, be increasing the stringency of the covenant to an unnecessary degree: and I think we give full effect to the covenant by holding that the meaning of the condition is, that such suspension can only occur upon the plaintiff's failure so to protect the patent-right, that is, by instituting and enforcing the necessary proceedings to punish or restrain an infringement. If that be so, reasonable notice that an infringement has taken place must be necessary in order to enable the patentee to take such proceedings. That, for the purpose of this argument, it is conceded has not been given. This was the view taken by the Lord Chief Baron at the trial, and I entirely agree with him. I think Mr. M'Intyre has exercised a wise discretion in waiving the technical objections, and taking the opinion of the Court upon the substantial question in issue between the parties.

MONTAGUE SMITH, J. I am of the same opinion. There is, no doubt, some want of clearness in the way in which the parties have expressed themselves in this deed: but I have come to the conclusion that the right of the plaintiff to receive the stipulated royalties is not defeated by the proviso relied on. The covenant is, that, in case any person shall infringe the patent, the patentee will at his own cost take the proper proceedings to maintain its validity: and then follows that which is a part of the same covenant,—that, in case the patentee shall fail or neglect so to establish or maintain the validity of the patent, and put a stop to the in-

fringement, the payment of the royalties shall be suspended until he shall have done so. These appear to me to be the governing words of the condition. The construction sought to be put upon the deed by the learned counsel for the company seems to me to put the whole clause in abeyance. It comes to this, that the patentee is to be deprived of all royalties if there be any infringement of the patent-right, however wrongful or however unimportant, during the whole time that proceedings may be pending for the purpose of establishing the patent-right and restraining the infringement; thus withholding from the patentee the very means of performing his covenant. I cannot think that can be the proper construction of either the covenant or the condition.

Rule discharged. (1)

Attorneys for plaintiff: *Bothamleys & Freeman.*

Attorneys for defendants: *Chester & Urquhart, for Lace, Banner, & Co., Liverpool.*

(1) The plaintiff commenced a second action to recover three quarters' royalties, occurring between the 3rd of April and the 31st of December, 1867. After issue joined in that action, and notice of trial given, the defendants obtained an ex parte injunction to restrain the plaintiff from further prosecuting the action, and from commencing, instituting, or prosecuting any other action or suit at law or in equity against the company for the same purpose, until he should by authority of law or otherwise have restrained the Runcorn Company from working the patent processes comprised in the licence of the 1st of April, 1865, or any of them, or until the further order of the Court. This injunction was, on April 17, 1868, dissolved by Giffard, V.C.

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Feb. 10.

DANIEL *v.* THE METROPOLITAN RAILWAY COMPANY.

Railway Company—Negligence—Absence of due Precaution.

In order to charge a railway company or other carrier of passengers with negligence, it is necessary to shew circumstances from which it may fairly be inferred that the accident complained of resulted from the want of some precaution which the defendants might and ought to have taken; and also to shew with reasonable certainty what particular precaution had not been taken.

The plaintiff, while travelling by the defendants' railway, was injured by the fall of an iron girder, through the negligence of the workmen employed by a contractor in placing it across the retaining walls of the railway. It was proved that the work in question was extremely dangerous, and that it was the practice when such work was being done across railways, for the company to place a man to signal to the workpeople the approach of a train. This precaution was not adopted:—

Held, sufficient to warrant a jury in finding that the defendants were guilty of negligence.

The first count stated that the defendants were carriers of passengers for hire upon the Metropolitan Railway; that an iron girder was being placed across the railway, of which the defendants had notice; that the plaintiff was a passenger from Moorgate Street Station to King's Cross Station for reward; and that the defendants so negligently conducted themselves in carrying the plaintiff that he was by reason of their negligence injured by the fall of the girder upon the train, &c.

The second count charged the defendants with so negligently conducting themselves in carrying the plaintiff, and in managing the railway and train during the journey, that the plaintiff was hurt, &c.

The third count alleged that the defendants were possessed of a railway called, &c., over which were being carried on, as the defendants well knew, works dangerous to persons being conveyed upon the railway; that the defendants, whilst the works were in progress, and well knowing the premises, invited the plaintiff, who had no notice of the works to come upon the railway; that the plaintiff, in pursuance of the invitation, went upon the railway, and was by the defendants put into a carriage to be carried as a passenger for reward to the defendants; and whilst being conveyed by the defendants upon the railway, was injured by reason of the said works and the carrying on of the same, &c.

Pleas: 1. Not guilty. 2. To the first and second counts, that the plaintiff did not become and was not received by the defendants as a passenger, &c. 3. To the last count, a denial that upon or over the railway were being carried on, as they the defendants well knew, certain works dangerous to the lives or limbs of persons travelling or being conveyed upon the railway. 4. To the last count, that the defendants did not invite the plaintiff to come upon the railway, nor did the plaintiff, in pursuance of the said invitation, go upon the railway, nor was he received by the defendants or by them put into a carriage on the railway. Issue thereon.

The cause was tried before Martin, B., at the last summer assizes at Croydon, when the following facts were proved:—By the 23 & 24 Vict. c. cxciii, the corporation of London were impowered to establish at Smithfield a market, for meat, &c., and to appropriate the whole or any part of the underground surface beneath the intended market for the purpose of a railway-station, to be used by any railway company, or any persons desirous of constructing a railway to such market, and to enter into any contract with any railway company or persons for the excavation, building, and erection of such railway-station or terminus, and of the approaches thereto, and for the lease of the same, at such rent and upon such terms and conditions as should be mutually agreed upon. In the year 1861, the Metropolitan Railway Company obtained an act (24 & 25 Vict. c. cxxxiii) authorizing them to make a line of railway to improve the means of communication with the intended market at Smithfield, and to enter into agreements with the Great Northern and Great Western railway companies for the use of the Metropolitan railway: and by s. 33 the three companies were authorized to make agreements with the corporation of London touching the lease, occupation, and use of the under surface of the market, the works to be done by all or any of the companies in connection therewith.

On the 22nd of July, 1862, an agreement was entered into between the corporation of London and the Great Western and Metropolitan railway companies, for the erection of a railway-station under the proposed market. By this agreement the companies undertook amongst other things to make all proper and sufficient retaining or other walls sufficient for the support of the

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walls of the market-house and the roof of the station, the corporation to have the user of the station-walls to be built up by the companies, as the foundation-walls for the market-house to be erected by the corporation in accordance with the Market Act, 1860; all the works up to the surface level being executed by the companies, and all the works above that surface level being executed by the corporation.

The defendants having constructed their railway and the retaining walls of the proposed station, the corporation of London contracted with Messrs. Kelk for the erection of the market; and Messrs. Kelk contracted with the Thames Iron Works Company for making and fixing the iron girders which were to form the roof of the railway and the floor of the market. Whilst the workmen of the Thames Iron Works Company were in the act of placing one of these girders in its proper position, it fell on to the railway below, crushing one of the carriages of the train in which the plaintiff was travelling, and which had just started from the Aldersgate Street station, distant about two hundred yards, killing three of the passengers, and seriously injuring the plaintiff.

It appeared that six or seven of these girders had been safely placed across the excavation by manual labour; and that, on the occasion in question, the girder which fell was being conveyed across those which were already fixed by means of a donkey-engine, which some of the plaintiff's witnesses, and especially one Hussey, the engineer, and Malding, the foreman of the Thames Iron Works Company, described as being a less safe mode, inasmuch as the power was necessarily applied by a jerking motion which it was difficult to control; and to this they attributed the overbalancing of the girder and its consequent fall.

There was no evidence that the driver was aware when he left the Aldersgate Street station that any work of a dangerous character was going on above the railway. But it was proved that the defendants were aware that the girders were being laid, and no provision had been made by them either to warn the workmen that a train was approaching, or to inform the driver that a girder was being moved.

The evidence upon this subject, as reported by the learned judge, was as follows:—

Smith, a hoister in the employ of the Thames Iron Works Company, said: "This was the first girder being moved by the steam-engine. It is always moved with a jerk. There was nothing at the back of the girder to regulate the motion. There is a balance mark. If it went beyond this mark there would be danger. It was the ganger's business to see that it was not drawn beyond the balance point. It was standing just before the accident. Orders were given to the engine-man to go on. The order was communicated by a lad with a flag. It slipped over just as the engine of the train progressed from under the arch. I have had twenty years' experience of these works. It is very dangerous work. We are always liable to accidents." On his re-examination this witness said: "I have done work of this kind on railways. It has been done when the trains were passing below. We always had a railway man to give notice when a train approached." In answer to the judge, he said: "I never knew or heard of a girder falling in this way before."

Malding, foreman of the Thames Iron Works Company, said: "The railway company had not placed any person to signal the trains when the girders were being moved. Moving girders is rather a dangerous matter. There was no check upon the girder behind, that I was aware of. I am not aware that any precaution was used by the railway company to caution the railway train. We had no person to tell us of the approach of the train. There has generally been a railway company's man to give notice to us with a flag that trains were coming. I think it is not safe to convey a train through whilst girders are moving."

Hussey, an engineer in the same employ, said: "I have had experience in the moving of girders. I think precaution is necessary. The railway company always employed a man to signal the trains, and see that the line is clear. I think it is not safe to move trains under a girder whilst it is being moved." On cross-examination, this witness said: "I never suggested that men should be appointed to attend by the railway company."

On the part of the defendants, it was submitted that there was no evidence to go to the jury of negligence on the part of their servants.

The learned judge said that, in order to render a company re-

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sponsible for an act done by its servant, the relation of master and servant must be shewn to exist; that no such relation existed between the defendants and the persons engaged in placing the girder, because it was proved that they were the servants of the Thames Iron Works Company, for whose negligence the defendants could not be responsible; that the only possible negligence attributable to the defendants was the omission to place a man on the watch to give notice of the approach of the trains; and that, but for the evidence of the witness Hussey, he would have said there was clearly no case.

The case did not go to the jury; but a verdict was taken for the plaintiff, pro formâ (the amount of damages to be assessed by an arbitrator), with leave to the defendants to move to enter a verdict for them, or a nonsuit, if the Court should be of opinion that there was no sufficient evidence of negligence,—the Court to draw any inferences of fact.

Hawkins, Q.C., in Michaelmas Term last, obtained a rule nisi accordingly.

Day, and *Morgan Howard* (*Ballantine, Serjt.*, with them) shewed cause. There was abundant evidence to warrant the jury in finding that the defendants were guilty of negligence. Knowing that a work of so dangerous a character was in course of erection over their line, they were bound to adopt some precaution to prevent injury to their passengers, either by causing the workmen in the employ of the Thames Iron Works Company to suspend the work of moving the girders whilst a train was passing, or by stopping the train until the danger was past. The evidence shews that this course was usually adopted when works of the kind were going on at other railways. The absence of some such precaution, being a departure from the usual course, was strong evidence of negligence.

[MONTAGUE SMITH, J. Were the defendants bound to anticipate such extreme carelessness on the part of the Thames Iron Works Company's men?]

They had no right to speculate upon others performing a duty which the law casts upon themselves, viz. to use due care and diligence to carry their passengers in safety. Common prudence

should have dictated to them that the precautions above suggested should have been adopted.

Pollock, Q.C., and *Horace Lloyd* (*Hawkins, Q.C.*, with them), in support of the rule. To render the company liable in an action of this kind it is not enough to shew that an accident has happened: there must be substantive evidence that it was caused by some act on their part either of commission or of omission: *Carpue* v. *London and Brighton Railway Company* (1); *Bird* v. *Great Northern Railway Company* (2); *Latch* v. *Rumney Railway Company* (3); *Reedie* v. *London and North Western Railway Company* (4); *Hutchinson* v. *York and Berwick Railway Company* (5); *Scott* v. *London Dock Company.* (6) The placing of the girders was the act of persons over whom the defendants had no control: the work was being done for the corporation of London under the authority of an act of parliament. The defendants were not bound to assume that those who did it would so conduct themselves as to place the passengers on the railway in a condition of more than ordinary peril.

[MONTAGUE SMITH, J. The work in question being of an unusually dangerous character, were the defendants entitled to rely on its being done with due care by the contractors, and do nothing themselves?]

What could they do? They could not stop the course of their trains; nor could they suspend the works of the corporation.

[KEATING, J. Some of the servants of the Thames Iron Works Company were indicted for manslaughter arising out of this accident. Upon the trial of the indictment they strongly insisted upon the hardship of making them liable, when they had no notice when the trains were approaching.]

Suppose a stage-coach or an omnibus being driven past a house or under a bridge whilst under repair, and a stone or a brick from the house or the arch falls upon and injures a passenger, would the proprietor of the stage-coach or omnibus be liable? The work in question is only dangerous if unskilfully or negligently con-

(1) 5 Q. B. 747.
(2) 28 L. J. (Ex.) 3.
(3) 27 L. J. (Ex.) 155.
(4) 4 Exch. 244; 20 L. J. (Ex.) 65.
(5) 5 Exch. 343.
(6) 3 H. & C. 596; 34 L. J. (Ex.) 17, 220.

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ducted. The accident was purely exceptional in its character, and not one which could have been foreseen or provided against. A new method of moving the girders to the places which they were destined to occupy was for the first time being tried, viz. by means of a small steam-engine, and it turned out to be less safe than the old method of moving them by manual labour. Of this,—to which alone the accident was attributable,—the defendants had no notice. There is no law by which a railway company is bound to have a signal-man at every point where there is a possibility of risk.

[WILLES, J. The evidence shews that it was usual to have a signal-man when works of this nature are going on, and that, if a signal had been given from the Aldersgate Street station that a train was starting, and that signal had been acted upon, the accident in all probability would have been avoided.]

The signal, if given, would have been given to persons who were under no obligation to attend to it, and who probably, relying on the fact of no similar accident having occurred before, would not have heeded it.

WILLES, J. This was an action by a passenger on the Metropolitan railway for an injury sustained by him from the falling of an iron girder on to the roof of the carriage in which he was travelling; and he seeks to charge the company with liability by reason of negligence. I agree entirely with the counsel for the defendants that it is not enough for the plaintiff to shew that there has been an accident upon their line, and thence to argue that therefore the company are liable even primâ facie. It is necessary for the plaintiff to establish by evidence circumstances from which it may fairly be inferred that there is reasonable probability that the accident resulted from the want of some precaution which the defendants might and ought to have resorted to: and I go further, and say that the plaintiff should also shew with reasonable certainty what particular precaution should have been taken. It is not necessary in this case to draw a distinction between railway companies and other carriers of passengers, or to lay down any rule beyond this, that, if the company know that there is unusual danger from work which is in progress on or over the line, and have it in their power to avert the consequences of that danger

by the use of reasonable precaution, they are bound to adopt that precaution, and, not doing so, they are guilty of a breach of duty. Having said thus much, I will proceed to examine the evidence, in order to see if the company were bound to resort to some precaution which might have averted the injury. First, was there such a danger as made it the duty of the company to resort to any precaution? Those who undertake to carry passengers for hire are bound to use reasonable diligence to carry them safely; but they are not bound to be constantly on the look-out for every possible danger. The case of a van laden with heavy bales of goods may afford a familiar illustration. Suppose a van so laden to be passing along a highway, and in consequence of the insecure fastening of the load one of the bales falls and injures one of the passengers of a stage-coach travelling on the road,—would the proprietor of the coach be liable for that injury? Clearly not. It was not the duty of the coachman to inquire whether or not the van was properly loaded, any more than it would be the duty of any one of the public. The risk there is one which is common to all persons using the highway, and therefore one which the passenger, as between him and the coach-proprietor, takes upon himself. That case differs from the present in two particulars. In the first place, it is an ordinary danger to which every person using the highway is exposed; and, in the next place, no precaution which the coachman could have taken would have averted the danger. This is the case of a peculiar and unusual danger, which was known to the carrier but not to the passenger, and one to which the latter might not have consented to expose himself, viz. to pass under a girder of many tons weight which was being placed across the line, and which by the slightest want of caution on the part of the workmen engaged might be precipitated on his head; and this without any provision being made by signal or otherwise to warn the workmen of the approach of a train, or the driver of what was passing above him. Is that an exaggerated statement of the evidence? [His Lordship read from the judge's notes the evidence of Smith, Malding, and Hussey.] Here we have an article weighing many tons, which is so nearly equibalanced over the railway that the slightest shock or jerk will cause it to drop over. On the other hand, there is

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a piece of evidence which was much relied on for the defendants. In answer to a question put to him by my Brother Martin, Smith says, "I never knew or heard of a girder falling in this way before." The work is admitted to be one of extreme and unusual danger, and not an every-day work. Is it to be contended, as a matter of fact, that it is reasonable that railway passengers should be exposed to such danger, without any precautions being taken? I should have thought that an ordinarily reasonable and careful man would have adopted some precaution to avert the danger or diminish the risk. I do not mean to lay it down as a proposition of law that that which is usually done is a reasonable thing to do, because there are silly and void usages. But that which is usual amongst practical men in the ordinary transactions of life, is cogent evidence of that which it is reasonable to do in similar circumstances; and the omission to do so is evidence of negligence. It is material, therefore, to see whether there was any evidence that it was usual, when works of this kind were being carried on upon a line of railway in full traffic, to do anything to guard against danger. Smith, a hoister in the employ of the Thames Iron Works Company, says, "I have done work of this kind on railways. It has been done when the trains were passing below. We always had a railway man to give notice when a train approached." Malding, the foreman, says, "We had no person to tell us of the approach of the train. There has generally (meaning, upon other occasions,) been a railway company's man to give notice to us with a flag that trains were coming." And Hussey, the engineer, says, "I think precaution is necessary. The railway company always employed a man to signal the trains, and see that the line was clear. I think it is not safe to move trains under the girders whilst they are being moved." Thus it appears to be usual in such cases to adopt some precaution to let the workmen know that a train is coming. There appears to be some discrepancy in the evidence as to whose duty it is to give notice,—whether the persons who are doing the work should stop, or the train. The first two witnesses seem to think that the former should suspend their work: but, according to the evidence of Hussey, it would seem that he thought it the duty of the company to stop the train. But, be that as it may, the whole evidence shews that it is usual

to have some intelligence between the company and the workmen either to stop the train for a while, or to abstain from moving the girder until the train has passed. I do not go into the question whether or not works of this description should be done at night. It is enough to say that this was a work of extraordinary danger, and that it was the duty of the company to take some precautions. It is clear that none were taken. I agree that it is not enough for the plaintiff to shew that no precaution was taken, but that he must go further and shew that if certain precautions had been adopted the accident might and probably would not have happened. The chief evidence on that point is that of Smith. He says that the application of steam-power caused the girder to be moved by jerks; and that the girder was standing just before the accident. If, therefore, a signal had been given from the Aldersgate Street station that a train was coming, it was only necessary for the people working the girder to stop until one hundred yards had been passed over by the train, to make all safe. If I were called upon as a juryman, without coming to a conclusion which would impute criminal recklessness to the workmen, I must say I think there was reasonable evidence that the accident might and probably would have been avoided if there had been a signal-man. On the ground, therefore, that this was not one of those every-day accidents to the risk of which every passenger consents to expose himself; that the company knew that the work was dangerous and required extra precaution, and that, unless extra care was taken, slight negligence on the part of the workmen would lead to serious consequences; and that they chose to trust to the men who were doing the work without a signal-man; I think the defendants ought to be held responsible for the consequences. It was proved to be usual in such cases to take precautions by giving warning; and that which is usual is some evidence of what is reasonable. If such precautions as have been suggested had been taken, the accident might and probably would have been avoided. That establishes a case of breach of duty, and of damage proximately following from such breach of duty. I come therefore to the conclusion, as a mixed question of law and fact, that the jury might reasonably have found a verdict for the plaintiff, and that that verdict would not have been disturbed by the Court.

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KEATING, J. I am of the same opinion. The question is whether the jury would have been justified in finding for the plaintiff. It seems to me that there was abundant evidence to justify them in so doing. The existence of the danger was known to the defendants, and they took no means to lessen or avert it. I cannot assent to Mr. Lloyd's ingenious argument, that the circumstance of the company having no legal control over the persons who were engaged in placing the girder, dispensed with the necessity of their giving them notice of the approach of trains. It seems to me that it was competent to the jury to consider the probability of the workmen obeying a signal, if given: and I think it is highly probable they would have done so. The reasonable inference from all the evidence is, that the company were guilty of negligence. For the reasons given by my Brother Willes, I am of opinion that the rule should be discharged.

MONTAGUE SMITH, J. I am of the same opinion. There was abundant evidence to warrant a jury in finding for the plaintiff; and I think we could not properly have set aside such a verdict, if found. The plaintiff had to establish three propositions,—first, that the work in question was of a dangerous nature, and likely to cause injury,—secondly, that the defendants were aware of the danger,—thirdly, that there were reasonable precautions which might have been and were not taken to avert the mischief. I abstain from going through the evidence: but it seems to me there was abundant to sustain all three of those propositions. The strongest argument in the defendants' favour is that such an accident had never happened before. But the evidence shewed that it was usual to adopt precautions to prevent accidents: and, possibly, if the same course had been pursued here, this accident might have been avoided. It is impossible to help recognizing the fact that there must be a considerable amount of danger in suspending a heavy girder in this way, even with the exercise of the greatest care. And I cannot say that there was such an absence of probability of danger that the defendants were justified in going on with the traffic as usual, and taking no precautions whatever. There was abundant evidence that the defendants knew what was going on. Assuming that they are not answerable for the acts of the

contractors, and that the latter were working under the corporation of London, and not under the defendants, they knew the dangerous nature of the work, and yet did nothing. It has been urged that they might fairly rely on the workmen using due care; and in some cases, no doubt, that may be so, as, for instance, in driving through the streets of London, every one who drives relies in some degree on others acting upon the ordinary rules of the road: but it has never been held that a man may not be guilty of negligence in relying on the exercise of care on the part of another. This was a case very peculiar in its circumstances: and, seeing the magnitude of the danger, and the probability of accident, I think the defendants were not justified in trusting to the exercise of supreme care on the part of the workmen employed.

Rule discharged.

Attorneys for plaintiff: *Harcourt & Macarthur.*
Attorneys for defendants: *Burchells.*

DUCKETT *v.* SATTERFIELD AND ANOTHER. *Feb.* 24.

Charterparty, construction of—Full Cargo—Broken Stowage.

By a charterparty the merchant contracted to load "a full and complete cargo of sugar in cases, or other lawful merchandize, with sufficient bags for broken stowage," at a certain rate of freight per ton for sugar, "and for other produce a rate proportionate to sugar in casks, with sufficient bags for broken stowage, agreeably to the custom of the port of loading." By the custom of the loading port, a given quantity of cotton was to be taken as equal to a ton of sugar. The charterer filled the ship with cotton, putting on board a reasonable quantity of stone for ballast:—

Held, that the stipulation for "sufficient bags (of sugar) for broken stowage" was only applicable to a cargo of sugar in cases or casks, and consequently that the engagement to ship a full cargo of lawful merchandize was performed.

THIS was an action by a shipowner against the charterers of the ship, for not loading a full and complete cargo pursuant to the charterparty.

The cause was tried before Montague Smith, J., at the last summer assizes at Liverpool. The charterparty provided, that the ship should load from the defendants' factors, a full and complete

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cargo of lawful merchandize, with which she should proceed to Bahia, and there deliver the same, according to the custom of the port, to the defendants' agents, and afterwards in the customary manner receive from them, or at their instance, at the said port of Bahia, or at a safe port between Bahia and Rio Grande del Norte, if so ordered, "a full and complete cargo of sugar in cases, or other lawful merchandize, with sufficient bags for stowage;" freight being paid on delivery of cargo, according to certain specified rates; and for "other produce a rate proportionate to sugar in casks, with sufficient bags for broken stowage, agreeably to the custom of port of loading," &c.

The charterers' agents at the port of loading, Paraiba, which is an outport of Pernambuco, put on board a full cargo of cotton, with sixty tons of stone for ballast, which would have been unnecessary if sugar had been loaded.

For the plaintiff it was contended that, according to the terms of the charterparty, sugar in bags should have been taken instead of the stone ballast, which would have given a considerably larger freight than that earned by the cotton,—sugar being classed with weight, cotton with measurement goods.

Witnesses were called for the defendants to prove that there was a custom at the port of loading that, if cotton is loaded instead of sugar, 29 arobas of 32 lbs. each (928 lbs.) were to be taken as equal to a ton of sugar.

The jury found that the custom was proved; and that a full and complete cargo was put on board, according to the terms of the charterparty. A verdict was thereupon entered for the defendants.

C. Russell, in Michaelmas Term last, obtained a rule nisi to enter a verdict for the plaintiff.

Quain, Q.C., shewed cause. The words of the charterparty, "sufficient bags for broken stowage," are applicable only where the cargo consists of sugar in cases or hogsheads, and not to cotton or any other loading which the charterers were entitled to put on board. There is nothing in the charterparty to prevent the putting in ballast; and consequently the charterers performed their contract when they shipped a full cargo of cotton, with such an

amount of stone ballast as was necessary to trim the vessel: *Moorson* v. *Page*. (1)

Manisty, Q.C., and *C. Russell*, in support of the rule. The charterers were to have the option of loading merchandize other than sugar, paying for "other produce a rate proportionate to sugar in cases, with sufficient bags for broken stowage." Whatever the cargo, sugar in bags is to be put on board for broken stowage, and not ballast. There was no evidence to sustain such a custom as that set up by the defendants.

Cur. adv. vult.

Feb. 24th. The judgment of the Court (Willes, Keating, and Montague Smith, JJ.) was delivered by

WILLES, J. In this action, in which the shipowners relied on a breach of the stipulation to load a full and complete cargo, the jury found a verdict for the defendants.

The plaintiff contends that the ship should not have taken stone as ballast for the cotton, but sugar in bags. We think, however, that the charterers were not bound, under the terms of this charter, to ship "sufficient bags (of sugar) for broken stowage" with any other cargo than sugar in cases. The charter attaches this obligation to the shipment of a cargo of sugar in cases, for the obvious reason that cases do not fully fill the ship, and require bags, which are more flexible, for the broken stowage. It seems to us that this obligation did not attach to a cargo of cotton or of other produce which the charterers were at liberty to load.

We think, therefore, that the rule to enter the verdict for the plaintiff must be discharged, and that the part of the rule which prays for a new trial must also be discharged. The jury found that a full and complete cargo was loaded; and we think, upon the evidence, the verdict was right.

Rule discharged.

Attorneys for plaintiff: *Chester & Urquhart.*
Attorneys for defendants: *Norris & Allen.*

(1) 4 Camp. 103.

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Jan. 22.

CLARKE and Others *v.* THE TYNE IMPROVEMENT COMMISSIONERS.

Practice—Undertaking on Refusal of Order—Drawing up Judge's Order—Costs, Taxation of—Master's Discretion.

A summons to change the venue from London to Newcastle being opposed by the plaintiffs, the judge indorsed the summons, "No order; the plaintiffs undertaking to tax, if successful, as if tried in Northumberland:"—

Held, that this was binding upon the plaintiffs as an undertaking, though no order was ever drawn up.

The cause was in the paper six days, and was tried on the fifth and six days, when the plaintiffs had a verdict. On taxation, the master allowed only two days' attendance of the plaintiffs' attorney and witnesses, considering that their detention would not have exceeded that space of time if the cause had been tried at Newcastle. He also refused to allow the estimated cost of a journey from London to Newcastle of two witnesses (residents of South Shields), who happened to be near London at the time of the trial. He further disallowed detention money to witnesses whose ordinary place of abode was Newcastle or the neighbourhood, upon the presumption that they would probably have been at home at the assize time:—

Held, that these were matters for the master's discretion, and that he had not so plainly and obviously erred as to induce the Court to interfere.

This was an action brought to recover damages for an injury sustained by a vessel of the plaintiffs in the river Tyne through a collision with a vessel belonging to the defendants. The venue was laid in London.

On the 4th of February, 1867, the defendants took out a summons to change the venue to Northumberland. This was opposed, and, after some discussion and an adjournment, Keating, J., on the 8th, made the following indorsement on the back of the summons:—"No order; the plaintiffs undertaking to tax, if successful, as if tried in Northumberland." No formal order was drawn up, nor was any copy of the indorsement served on the plaintiffs' attorneys.

The cause was tried at the sittings in London after last Trinity Term, when a verdict was found for the plaintiffs for 354*l.* 12*s.* 11*d.* The cause was actually in the paper for six days: the trial occupied two days. Upon the taxation of costs, the defendants' agents produced before the master the summons with Mr. Justice Keating's indorsement thereon, and claimed to have the costs taxed upon the terms of that undertaking. To this the plaintiffs' attorneys

objected, on the ground that no such undertaking had in fact been given, and that no order had ever been drawn up, or any intimation given to them that such indorsement had been made. The master proceeded to tax the costs upon the footing of the undertaking; and, as he had no means of determining what time would have been required for the trial of the cause at Newcastle, he declined to allow the costs of the attendance of the plaintiffs' attorneys and their witnesses for more than the two days actually consumed in the trial,—that being the time allowed (besides the commission day) for the trial of causes at Newcastle. He also disallowed travelling expenses (from Strood, in Kent, to Newcastle,) of two witnesses (sailors) whose residences were in South Shields, but who happened to be at Strood at the time of the trial, —considering that they might not have been absent from home at the time of the Newcastle assizes. Whether or not he allowed their travelling expenses from Strood to London, did not appear. He also disallowed all payments to witnesses as compensation for engagements as seamen which they were obliged to decline in consequence of being subpœnaed as witnesses, and all moneys paid to them in consideration of their waiting on shore until the trial came on. He, however, added the estimated travelling expenses and loss of time of a journey from London to Newcastle, of a witness who resided in London.

Rew, in Michaelmas Term last, obtained a rule nisi for a review of the taxation.

T. Jones, Q.C., and *G. Bruce*, shewed cause. Although there is some conflict upon the affidavits, the fair result of them is that the indorsement on the order of the 8th of February was made with the consent of the plaintiffs' agents. The only question, therefore, is, whether the Court can see that the master has taxed the costs upon an erroneous principle. As to the time allowed for the attendance of the attorneys and the witnesses, that clearly was for the master's discretion. The other matters also were purely for the master; and the Court will not interfere with his exercise of discretion, unless satisfied that he has grossly erred.

H. Giffard, Q.C., and *Rew*, in support of the rule. If the indorsement on the summons was intended to be acted upon, it

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should have been drawn up and served: *Joddrel* v. ——— (1); *Wilson* v. *Hunt* (2); *Sedgewick* v. *Allerton*. (3)

[BOVILL, C.J. That is, where they are to operate as orders. This is not the case of an order at all, but of an undertaking.]

Then, as to the taxation,—The cause having once been set down for trial in London, the master had no right to take into consideration the fact of another long cause being before it. The attorneys and the witnesses were bound to be in attendance. If the taxation was to take place upon the supposition that the cause was tried at Newcastle, the plaintiffs were entitled to the expenses which would in that case have been incurred in carrying the two witnesses from Strood to Newcastle. The witnesses being sailors, there was no ground for the master's presumption that they would be at home at the period of the Newcastle assizes. The refusal to allow the detention money was based upon the same presumption, and was also improper.

BOVILL, C.J. The first question for our consideration is whether or not there is an undertaking contained in the indorsement made on the summons by my Brother Keating on the 8th of February. The affidavits on the one side and on the other are not altogether consistent on the point, and therefore the only safe guide for us is the indorsement itself. Upon looking carefully through the affidavits, I come to the conclusion that there was an undertaking given. I also agree that, if an order had been made and it had been necessary that it should be drawn up in order to give effect to it, the indorsement must have been embodied in it. But here no order was made: the indorsement is, "No order; the plaintiffs undertaking to tax, if successful, as if tried in Northumberland." I cannot think that, in order to give validity to an undertaking so given by an officer of the Court, it is necessary that an order should be drawn up. The undertaking is binding on the parties without an order. Assuming, then, that the undertaking was given and is binding on the plaintiffs, three objections have been urged against the master's taxation. In the first place it is said the master was wrong in allowing only two days' attendance of the witnesses, although the

(1) 4 Taunt. 253. (2) 1 Ch. R. 647.
(3) 7 East, 542.

cause was in the paper six days. It was for the master to say whether or not the witnesses were detained longer by reason of the trial having taken place in London than they would have been if the cause had been tried in Northumberland. It is extremely difficult for us to say whether he was right or wrong in so doing. It was clearly a matter for his discretion: and, if so, a strong case must be made out to induce us to allow a review. I think this point fails. The second objection is, that the master refused to allow the expenses of conveying two witnesses from Strood to Newcastle. Those witnesses did not in fact incur the expense of journeying from Strood to Newcastle, but only from Strood to London. There is no complaint that the expenses to London were not allowed. I am of opinion that the undertaking is to be construed to mean that the plaintiff should be allowed all expenses actually incurred, as if the cause had been tried at Newcastle, that is, provided they should not exceed the expenses which would have been incurred if the trial had taken place there. The last objection is, as to the non-allowance of costs for the detention of certain witnesses in London. It seems to me that it was for the master to determine whether or not that detention would have been necessary if the cause had been tried at Newcastle. Who but the master could decide that? No facts are laid before us to shew that the master was so palpably wrong as to warrant us in interfering. The rule must be discharged.

WILLES, J. I am of the same opinion. As to the undertaking, that stands as a contract between the parties. I remember hearing Lord Tenterden say that attorneys ought not to be bound by undertakings which are not in writing. Here, the undertaking is in the handwriting of the judge, who represents the Court. It may sometimes be expedient to draw up a formal order upon a paper signed by a judge: but the only use of that would be for the purpose of issuing an attachment, not where, as here, it is only a direction to the officer of the Court to do something. The undertaking, as it stands, applies to all ordinary circumstances of a trial at Newcastle. That being so, the mode of taxation was for the discretion of the master; and, to induce us to interfere with that, it is not sufficient to suggest some doubt; we cannot review the

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master's discretion unless satisfied that he is clearly wrong. In the taxation of a long bill of costs, there must always be more or less of give and take.

KEATING, J. I am of the same opinion. The contradiction upon the face of the affidavits arises simply from a misapprehension. But I must say that, considering what passed before me on the first occasion, if it had been intended to withdraw the undertaking, care should have been taken to call my attention to the fact. The plaintiffs' attorney must have known that some indorsement would have been made, otherwise the order would have been made against him.

MONTAGUE SMITH, J. I am of the same opinion. There can be no doubt that the undertaking was binding. The judge thought it right to impose terms on the plaintiffs, refusing the order assuming those terms to have been agreed to. It is difficult to understand how it happened that the plaintiffs' attorney did not see what took place. As to the taxation, I am unable to see that the master has done anything wrong. The intention was, that the defendants were to be put to no greater expense than if the trial had taken place at Newcastle. The master had to arrive at the best conclusion he could under the circumstances. I see no ground for our interference.

Rule discharged, without costs.

Attorneys for plaintiffs: *Redpath & Holdsworth.*
Attorneys for defendants: *Cookson, Wainewright, & Co.*

PICKERING AND ANOTHER *v.* THE ILFRACOMBE RAILWAY COMPANY.

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Railway Company—Certificate of Engineer for Work done, &c.—Assignment of a Call not yet payable—Power of Sale—Notice of Assignment to the Shareholder—Garnishee Order under the Common Law Procedure Act, 1854, *ss.* 61, *et seq.*

The defendants signed judgment against a railway company on the 9th of February, 1866, and on the 31st of July obtained a garnishee order nisi under the Common Law Procedure Act, 1854, whereby it was ordered that all debts due and owing or accruing due from Lord P., a shareholder in the company, should be attached to answer the judgment. On the 12th of May, the plaintiffs (the contractors for the line) received from the company's engineer a certificate in the form agreed on by the company, that 96,200*l.* was due to them for work done and materials supplied under the articles of agreement, one of the clauses of which authorized the engineer from time to time to "ascertain the extent and value of the works then executed and the materials then provided for the works by the contractors." Of this a sum of 11,000*l.* represented materials provided for, but not actually affixed to, the line. On the 4th of June, 1866, the company issued to the plaintiffs paid-up shares to the amount of 56,200*l.* in part satisfaction of the sum so certified to be due. On the 11th of June they made a call of 5*l.* per share, payable on the 14th of July; and on the 13th of July they, by a deed reciting that they were indebted to the plaintiffs in 40,000*l.*, assigned the call to them by way of security, with a power of sale at any time after the 13th of October.

Before the garnishee order was made absolute, the plaintiffs claimed from Lord P. 1000*l.*, being the amount of the call due upon 200 shares held by him; and the judge directed an issue, to try the validity of the assignment. Lord P. had no actual notice of the assignment, but he was present as a director at the board meetings at which it was resolved that the assignment should be made:—

Held, that it was competent to the company's engineer to certify for "materials;" that the company might properly assign the call as security for a bonâ fide debt, though the time for payment of the call had not yet arrived; that the assignment was not rendered invalid by the power of sale, inasmuch as the exercise of that power might be restrained by injunction, or that part of the deed rejected; and that, if notice were necessary in such a case (which the Court inclined to think it was not), Lord P. had such knowledge of the assignment as amounted to notice. *Watts* v. *Porter* (3 E. & B. 743; 23 L. J. (Q.B.) 345) questioned.

THIS was an issue to try whether an indenture of assignment of the 13th of July, 1866, whereby the Devon and Somerset Railway Company purported to assign a call of 5*l.* per share upon the shareholders in that company to the plaintiffs, by way of mortgage, was a good and valid assignment of such call, as against the defendants.

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The issue was as follows:—W. Pickering and J. Pickering affirm and the Ilfracombe Railway Company deny as follows, that is to say, the said W. Pickering and J. Pickering affirm that a certain indenture dated the 13th of July, 1866, made between the Devon and Somerset Railway Company of the one part and the said W. Pickering and J. Pickering of the other part, and which is to the tenor following, that is to say,—"This indenture, made &c., Whereas the company is indebted to the Pickerings, as the contractors for the making and construction of the said railway, in the sum of 40,000*l.* or thereabouts: And whereas the directors of the company on the 11th of June, 1866, made a call on the shareholders in such company of 5*l.* per share upon their several shares in that company, payable on or before the 14th of July, 1866: And whereas the Pickerings have applied to and requested the company to pay them the said sum so due and owing to them as such contractors as aforesaid, but which the company are unable at present to do, and they have therefore agreed to give the Pickerings security for the payment thereof, by assigning to them the said call of 5*l.* per share upon the shares in the company, which the company have agreed to do in manner hereinafter appearing: Now, this indenture witnesseth that, in pursuance and performance of the said agreement, and in consideration of 40,000*l.* so being due and owing to the Pickerings as aforesaid, as the company do hereby admit and acknowledge, they the company do assign unto the Pickerings, their heirs, &c., all that call of 5*l.* per share, &c., and all moneys which shall henceforth be paid or payable under or by virtue of the call, &c., and all the estate, &c., together with power in the name of the company to demand and sue for the same, &c., subject to a proviso for redemption on payment to the Pickerings on the 13th of October then next of the 40,000*l.* or such sum as on taking accounts shall be found due to them; with power to the Pickerings, their executors, &c., at any time or times after the 13th of October next, without any further consent on the part of the company or their successors, to sell the premises thereinbefore expressed to be assigned, or any part thereof, either together or in parcels, and either by public auction or private contract, &c., and apply the proceeds in the first place in reimbursing themselves the expenses

of and incident to the sale, and in the next place in satisfaction of the moneys due and owing on the security of these presents, and then pay the surplus to the company, &c.,"—is and operates as a good, valid, effectual, and binding assignment by the Devon and Somerset Railway Company to the Pickerings of the said call, &c., and that the said Devon and Somerset Railway Company had power to make the said assignment in the indenture mentioned, and that the property in the said call and premises passed by the assignment from the Devon and Somerset Railway Company to, and was thereby vested in, the Pickerings, at law or in equity, as against the Ilfracombe Railway Company; and the said Ilfracombe Railway Company deny that the said indenture is and operates as such good, valid, effectual, and binding assignment, and that the Devon and Somerset Railway Company had such power, and that the property in the said call and premises so passed and vested as against the said Ilfracombe Railway Company.

The issue came on for trial before Byles, J., at the sittings in Middlesex after last Michaelmas Term, when a verdict was found for the plaintiffs for 1000*l.*, subject to the opinion of the Court upon the following case:—

1. The plaintiffs carry on business in partnership as contractors for public works; and on the 19th of July, 1865, they contracted with the Devon and Somerset Railway Company to make the Devon and Somerset railway, in the manner appearing by the articles of contract, a copy of which was annexed to and was to be taken as part of the case. (1)

(1) The material parts of the articles of contract were as follows:—

Article 32. "The contract sum (660,000*l.*, Article 27) shall be apportioned as follows, that is to say:—

"(A) 42,000*l.*, part thereof, shall be considered as payable for the fulfilment by the contractors of their obligations under Articles 1 and 2, hereinafter referred to as their money obligations.

"(B) 40,000*l.*, further part thereof, or such further sum as shall be necessary, shall be considered as being payable for the fulfilment by the contractors of their obligations with respect to the acquisition of lands, buildings, and other property, hereinafter referred to as their land obligations.

"(C) 39,000*l.*, further part thereof, or such further sum as shall be necessary, shall be considered as being payable for the fulfilment by the contractors of their obligations with respect to the making of tunnels and matters incident thereto, hereinafter referred to as their tunnel obligations.

"(D) 14,000*l.*, further part thereof,

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2. The defendants on the 9th of February, 1866, obtained a judgment in an action against the Devon and Somerset Railway Company for 10,500*l.*, which judgment is still subsisting and unsatisfied.

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shall be considered as being payable for the fulfilment by the contractors, so far as that sum will extend, with respect to the making and fitting up of stations and the other works and conveniences connected therewith, hereinafter referred to as their stations obligations.

"(E) 531,000*l.*, residue thereof, shall be considered as being payable for the fulfilment by the contractors of all their other obligations under this contract, hereinafter referred to as their general obligations."

Article 35. "The company's engineer shall from time to time when thereunto reasonably requested by the contractors, but not more often than once in every calendar month, ascertain the extent and value of the works then executed and the materials then provided for the works by the contractors in fulfilment of their tunnels obligations, and also in fulfilment of their stations obligations, and also in fulfilment of their general obligations."

Article 36. "In certifying, the company's engineer, with respect to the tunnels obligations, shall have regard to the schedule of tunnels prices set forth in the schedule hereto and the sum (C) 39,000*l.*, and, with respect to the stations obligations, shall have regard to the schedule of stations prices set forth in the schedule hereto and to the sum (D) 14,000*l.*, and, with respect to the general obligations, shall have regard to the sum of (E) 531,000*l.*"

Article 37. "For the performance of the articles with respect to the general obligations, the company's engineer, by agreement with the contractors, shall divide the sum of 531,000*l.* (E) by the number of miles in the whole length of the railway, exclusive of so much of the railway as consists of tunnel; and the company's engineer and the contractor shall determine the proportions in which such mileage-rate shall be divided between and attributed to earthworks of art and permanent way and other works they think fit respectively."

Article 38. "The company's engineer shall from time to time, when thereunto reasonably requested by the contractor, but not more often than every calendar month, except as regards permanent way materials, deliver to them and also to the company separate and distinct certificates in writing under his hand of the sums not theretofore certified, and then payable, in respect of tunnels obligations and stations obligations respectively, in accordance with this contract, on account of the several sums (C) 39,000*l.*, and (D) 14,000*l.* and (E) 531,000*l.* respectively expressed, but not including in any of his certificates any sum otherwise certified."

Article 39. "The company's engineer, in making his certificates with respect to sums payable in respect of general obligations, shall have regard to the mileage division, and to the division between classes of works, and to the mileage progress made with every class of work respectively, and to the amount otherwise certified for materials."

Article 40. "The company will on the execution of these presents pay or satisfy to the contractors, by way of advance to them on their plant, 40,000*l.*, part of the sum of 531,000*l.*, and the

3. On the 12th of May, the plaintiffs received from the company's chief engineer a certificate or memorandum that 96,200*l.* was then due to the plaintiffs for work done and materials supplied under the articles of contract. Such certificate or memorandum is in the form agreed upon between the plaintiffs and the company's chief engineer at the commencement of the undertaking, as being the best adapted for such certificates or memoranda, having regard to the provisions of the contract with respect to mileage rates and division between classes of work. The number of "miles completed" of each class of work shewn therein was obtained by estimating in money the amount due in respect of each class of work, and reducing it into miles, at the rate of per mile in a schedule of prices annexed to the articles of contract.

4. At the time when this certificate or memorandum was given, no part of the railway was finished. Of the materials included therein,—being rails, sleepers, and materials of a similar character,—a portion of about 11,000*l.* in value had not been attached in any way to the soil, but was piled up in stacks upon and near the railway, for the purposes of its construction.

5. At the time when this certificate or memorandum was given, further work had been done by the plaintiffs in excavations and work of a similar kind beyond what was included in such certificate or memorandum, to an amount of about 17,000*l.* The reason of this was, that the certificate or memorandum shewed the amount of work done and materials provided at a date of about a month previous to the date of the certificate or memorandum.

6. On the same 12th of May, 1866, the company's chief engineer delivered to the secretary of the company a certificate that 96,200*l.* was then due to the plaintiffs for work done and materials provided under the said articles of contract.

7. On the 4th of June, 1866, the company, at the request of the plaintiffs, made in pursuance of the articles of contract, issued to the plaintiffs fully-paid-up shares to the amount of 56,200*l.*, in

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sum so advanced shall be set off in such sums and at such times as the company's engineer and the contractors agree on, against the sums from time to time certified by the company's engineer as being payable to the contractors in respect of the general obligations."

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part satisfaction of the sum so certified to be due; leaving 40,000*l.*, balance thereof.

8. The plaintiffs applied to the company for payment of this balance of 40,000*l.* They had up to this time received from the company under the articles of contract cash to the amount of 3000*l.* only. This amount of cash had been received under the company's chief engineer's certificates for work done and materials provided. Upon certificates given to the company's solicitors for sums paid by the plaintiffs in respect of the purchase of land in pursuance of the provisions of the articles of contract, the plaintiffs had received payment in shares to an amount exceeding 3000*l.*

9. At meetings of the directors of the company held respectively on the 8th and 11th of June, 1866, the plaintiffs' application (mentioned in par. 8), and the best mode of securing payment to them, was discussed; and it was decided that a call should be made, and assigned to the plaintiffs by way of security for the discharge of their claim.

10. At the meeting of the 11th of June, a call of 5*l.* per share, payable on the 14th of July, 1866, being the call in the issue mentioned, was made; and the company's solicitor was instructed to do what was necessary for the purpose of a valid assignment of the said call to the plaintiffs by way of security as aforesaid.

11. The company at this time had no money in hand with which the plaintiff's demand could have been satisfied.

12. In pursuance of the said instructions to the company's solicitors, the indenture set out in the issue was prepared by him; and the seal of the company was affixed thereto on the 13th of July, 1866.

13. Notice of the assignment was given to the company's bankers, at whose bank the call was made payable; and they were directed to hold the money received by them in respect of the call for the plaintiffs.

14. The Right Hon. Lord Poltimore was in July, 1866, the holder of 200 shares in the capital of the company; and on the 31st of July, 1866, a garnishee order nisi was obtained, whereby it was ordered that all debts due and owing (or accruing due) from the said Lord Poltimore to the company should be

attached to answer the said judgment recovered by the defendants against the company; and at the date of the order Lord Poltimore had not paid the said call of the 11th of June, 1866, in respect of his said shares; and there was due and owing from him to the company the sum of 1000*l.* in respect thereof.

15. Before the said garnishee order nisi was made absolute, the plaintiffs claimed the said debt of 1000*l.* due from Lord Poltimore to the company as aforesaid; and on the 18th of September, 1866, it was ordered by a judge at chambers that the said issue should be tried, and that Lord Poltimore should pay the amount due for the call into Court, less 2*l.* 2*s.* costs, and that thereupon he should be discharged from the claim.

16. Lord Poltimore has accordingly paid the said sum of 1000*l.*, less 2*l.* 2*s.*, into Court.

17. At the time when the garnishee order nisi of the 31st of July, 1866, was served on Lord Poltimore, he had received no express notice that the indenture of the 13th of July, 1866, had been sealed with the company's seal; but he had been present at both of the meetings of the directors of the company held on the 8th and 11th of June, 1866, and had presided as chairman at the latter of the two meetings.

18. Before the 31st of July, 1866, when the garnishee order nisi was obtained, the plaintiff had received from the company debenture bonds of the company to the amount of 35,000*l.* in part satisfaction of their claim of 40,000*l.*

19. The acts by which the defendants and the Devon and Somerset Railway Company are respectively incorporated (1) were to form part of the case.

The question for the opinion of the Court was, whether the plaintiffs were entitled, as against the defendants, to the 1000*l.*, less 2*l.* 2*s.*

The Court was to be at liberty to draw inferences of fact.

Mellish, Q.C. (*F. M. White* with him), for the plaintiffs. The defendants, having signed judgment against the Devon and Somerset

(1) The Ilfracombe Railway Company was incorporated by 27 & 28 Vict. c. cclxxii, amended by 28 & 29 Vict. c. lxxi; the Devon and Somerset Railway Company by 27 & 28 Vict. c. cccvii.

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Railway Company for 10,500*l.*, obtained a garnishee order under the 61st section of the Common Law Procedure Act, 1854, by which Lord Poltimore, who was indebted to the Devon and Somerset Railway Company in 1000*l.* for a call of 5*l.* on 200 shares in the company held by him, was ordered to pay the amount of the call to the defendants. The plaintiffs, the contractors for the Devon and Somerset railway, claiming to be entitled to the call by virtue of an assignment thereof made to them by the directors, an issue was directed to try the validity of that assignment. It will be contended on the part of the defendants that there was no consideration for the assignment, that the company had no power to charge the call, that the assignment is bad because it contains a power of sale, and that Lord Poltimore had no notice of the assignment, and therefore that the garnishee order must have priority. The contention on the first point will be that the engineer was impowered to certify only for work actually done, and not for materials, and that, consequently, the debt of 40,000*l.* was in reality only 29,000*l.*, and that had been paid. But the deed begins with a recital that 40,000*l.* was due from the company to the plaintiffs; and, if the engineer had de facto certified that the whole was due, the company would be bound by that certificate.

[BOVILL, C.J. Or, suppose there was no certificate at all, but the company chose to acknowledge themselves liable.]

Then it will be said that the assignment of the call was ultra vires, and the case of *Chambers* v. *Manchester and Milford Railway Company* (1), where raising money upon Lloyd's bonds was held to be illegal, will be relied on. But, though it may be illegal to borrow money upon a security of that description, there can be nothing illegal in a railway company paying its debts, or giving a security for a debt when unable to pay it. As to the power of sale, that probably got in through inadvertence; at all events, if there be any illegality in that, it may be rejected, and the deed may nevertheless be good. As to notice, the necessity for that rests upon the decision of the majority of the Court of Queen's Bench in *Watts* v. *Porter*. (2) The authority of that judgment is much diminished

(1) 5 B. & S. 588; 33 L. J. (Q.B.) 268. 10 Jur. N.S. 700

(2) 3 E. & B. 743; 23 L. J. (Q.B.) 345. 1 Jur. N.S. 133.

by the dissent of Erle, J.; and it is entirely disposed of by the cases of *Beavan* v. *Lord Oxford* (1) and *Kinderley* v. *Jervis*. (2)

Keane, Q.C. (*Bridge* with him), for the defendants. The assignment in question was clearly bad. There was no debt due from the company to the plaintiffs at the time the assignment was made. The engineer had no power to certify for materials which had not been actually affixed to the line.

[BOVILL, C.J. Could the company, after that deed, say in a court of equity that they were not indebted to Messrs. Pickering in 40,000*l.*?]

It was not competent to the company to assign the call. No doubt, they had a right to make a call, and to dispose of the fruits of it in paying their debts. But, until the money was actually in their hands, they had no right to deal with it. The borrowing powers of the company are contained in ss. 38—55 of the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16). This transaction sins against those provisions, and especially against s. 43.

[BOVILL, C.J. Is there anything in the general or the special act imposing any restrictions on the payment of debts by the company?]

The borrowing power of the company is restricted by s. 8 of the special act, 27 & 28 Vict. c. ccevii, to 166,000*l.*; but that power was not to be exercised until the whole of the capital of 500,000*l.* should be subscribed for or taken bonâ fide, and one half of that amount actually paid up. It would manifestly be a gross breach of duty for the company to sell a future call themselves: this deed impowers Messrs. Pickering to sell. Is there anything in any of the statutes to warrant that?

[BOVILL, C.J. The deed may be invalid as to the power of sale, and yet be good as to the rest.]

It is clearly contrary to the general scope and policy of the act to assign the right to a call, whether actually payable or only accruing due. Then, the deed is inoperative as against the garnishment order of the judgment-creditor, no notice thereof

(1) 6 D. M. & G. 492; 25 L. J. (Ch.) 299. 1 Jur. N.S. 1121

(2) 22 Beav. 1; 25 L. J. (Ch.) 538; 2 Jur. N.S. 602.

and see *Eyre* v. *M'Dowell*, 9 H. L. 619, 642.

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having been given to the garnishee. In *Watts* v. *Porter* (1), which arose upon s. 14 of the 1 & 2 Vict. c. 110, A., an attorney employed by B. to invest money, lent it to C. on an agreement by which C., as a security, charged his interest in 5000*l.* Consols standing in the names of trustees in trust for C. A. neglected to give notice to the trustees. Subsequently to this loan a judgment-creditor of C. obtained a charging order under the statute, notice of which was given to the trustees. C. took the benefit of the Insolvent Act. B. brought an action against A. for negligence: and, on the trial, the judge directed the jury, in estimating the damages, to consider that, as no notice had been given to C.'s trustees of the charging in favour of B., the subsequent charge created by the judge's order had priority over it. Upon a rule for a new trial, the majority of the Court (Erle, J., dissenting) held that the direction was correct, and that the judgment-creditor had the same rights as a subsequent incumbrancer without notice, and was, therefore, to be preferred in equity to A. That decision appears to have been somewhat dissented from in *Beavan* v. *Lord Oxford* (2), and *Kinderley* v. *Jervis.* (3) It was, however, followed by this Court in *Nicholls* v. *Rosewarne.* (4) The point also arose in *Sympson* v. *Prothero* (5) and *Webster* v. *Webster.* (6) The subject is likewise discussed in Miller on Equitable Mortgages, 188 et seq. 192. There is a most material distinction between the case put by Erle, J., in *Watts* v. *Porter* (1) and the present case. The defendants are not in the position of a person who has not trusted to the funds of the company. Proper notice, therefore, ought to have been given. In *Hirsch* v. *Coates* (7), it was held by this Court that an order upon a garnishee under the Common Law Procedure Act, 1854, has no operation upon debts of which the judgment-debtor has already divested himself by assignment. The ground of the decision is thus stated by Willes, J. (8): "I think this statute must be construed like any other statute, giving its words their plain, ordinary, and proper sense. So construing it, I

(1) 3 E. & B. 743; 23 L. J. (Q.B.) 345.
(2) 6 D. M. & G. 492; 25 L. J. (Ch.) 299.
(3) 22 Beav. 1; 25 L. J. (Ch.) 538.
(4) 6 C. B. (N. S.) 480; 28 L. J. (C.P.) 273.
(5) 26 L. J. (Ch.) 671.
(6) 31 L. J. (Ch.) 655.
(7) 18 C. B. 757; 25 L. J. (C.P.) 315.
(8) 18 C. B. at p. 764; 25 L. J. (C.P.) at p. 317.

think it can only operate to give the judgment-creditor the same degree of charge upon the debts which are the subject of the order as an assignment in bankruptcy would give,—such as the judgment-debtor was entitled to at law and in equity." The lien referred to in the 29th and 30th sections of the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126), must mean a lien in fact, —the actual manual possession of the thing. A charge means that in equity which is equivalent to a lien at law. To make it available, there must be notice.

Mellish, Q.C., in reply. The certificate is in the form which is usual in contracts for the making of what are called contractors' lines; and it is expressly found in paragraph 3 of the special case to be in the form agreed upon between the plaintiffs and the company's chief engineer. It was quite within the power of the engineer to certify for materials, though not actually affixed to the soil. The 35th article of the contract (1) distinctly authorizes him to do so. It is immaterial whether the assignment included future debts, because enough of the 40,000*l.* still remained unpaid at the date of the assignment and of the garnishee order. It is not suggested that there is any direct illegality in making an assignment of a call; but it is said that such a mode of paying the company's debt is contrary to the policy of the act. This is a doctrine which the Court will not favour or extend. The capital of the company and its borrowing powers are it is true limited; the former, by s. 5 of the special act, to 500,000*l.*; the latter, by s. 8, to 166,000*l.* The assignment in question does not increase the capital; nor is it a borrowing of money. It is a mere mode of paying an admitted debt, and therefore no violation of any statute. All that can be said is, that the company preferred paying their contractors, in order that the line might be completed, to paying the debt due to the Ilfracombe Railway Company. This is not an assignment of a future call, but of a call already made, which was debitum in præsenti solvendum in futuro. It is competent to a railway company to contract in any way which is not ultra vires, that is, "which is not forbidden expressly or by implication by the acts of parliament relating to these companies:" per Parke, B., in *South Yorkshire Railway and River Dun Company* v. *Great*

(1) Ante, p. 238.

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Northern Railway Company. (1) The onus of shewing that the transaction was ultra vires lies upon the defendants. Then, as to the power of sale, which could not have been exercised, if at all, until after the 13th of October, 1866,—assuming it to be bad, that does not necessarily vitiate the assignment. The only consequence will be that the plaintiffs may be restrained by injunction from carrying that power into execution. Lord Poltimore had notice of the assignment. He was present at the meetings at which the resolution to give it was come to, though not when the seal of the company was affixed to it. The courts of equity treat knowledge and means of knowledge as equivalent to notice. *Watts* v. *Porter* (2) was not a case under the garnishee clauses of the Common Law Procedure Act, 1854, but under the 1 & 2 Vict. c. 110, s. 14, the language of which is widely different; for, under that section, the order is to have the same effect as if the debtor had made the assignment; whereas, in the 61st section of the 17 & 18 Vict. c. 125, the words are "that any other person is indebted to the judgment-debtor," and these words have been construed to mean indebted in law and in equity. If the debt has been assigned, the garnishee is not indebted to the judgment-debtor within those words. The creditor of the judgment-debtor can have no greater rights than the judgment-debtor himself has. The test is, could the judgment-debtor have maintained an action for the debt? If the garnishee would have had a defence in law or in equity to such an action, he clearly is not indebted to the judgment-debtor within the meaning of the act. The decision in *Watts* v. *Porter* (2), if not expressly overruled by the cases of *Beavan* v. *Lord Oxford* (3) and *Kinderley* v. *Jervis* (4), was evidently not approved of,—the learned judges in both those cases agreeing with the opinion of Erle, J.; and this Court will, if necessary, adopt the same view. In the other equity cases referred to, there was actual notice. In none of the cases has this precise question arisen.

BOVILL, C.J. I am of opinion that the plaintiffs are entitled to judgment. The question arises upon an interpleader issue, and turns upon the validity of a deed executed on the 13th of July,

(1) 9 Ex. 55, 89; 22 L. J. (Ex.) 305, 316.

(2) 3 E. & B. 743; 23 L. J. (Q.B.) 345.

(3) 6 D. M. & G. 492; 25 L. J. (Ch.) 299.

(4) 22 Beav. 1; 25 L. J. (Ch.) 538.

1866, whereby the Devon and Somerset Railway Company assigned to Messrs. Pickering, a call made on the shareholders of 5*l.* per share on the 11th of June, 1866, which was not payable until the 14th of July. The first objection taken to the validity of the deed was that there was no debt actually due to the plaintiffs, for which the deed could be a security. Upon the statements in the case, it clearly appears that a certain amount was payable from the company to the plaintiffs. The question resolves itself into this, whether a sum of 11,000*l.* worth of rails, sleepers, and other materials mentioned in the fourth paragraph of the case, was to be considered and treated as part of the debt. It was urged on the part of the defendants that the engineer had no power under the articles of contract to certify in respect of rails and materials not actually used. But, considering the nature of the contract, and referring, amongst others, to article 35, I come to the conclusion that the engineer was to certify not only for permanent work completed on the line, but also for materials provided for its construction. If the engineer had power to certify for materials, he has done so; consequently this objection fails. But, independently of that, supposing there was no clause in the contract impowering the engineer to certify for any other than work actually completed, it seems to me to be perfectly competent to the parties to agree that the value of rails and other materials brought upon the line and intended to be used in its construction, should form part of the sum to be certified for as due. If it were necessary so to decide, I should also be inclined to hold that the assignment was to be a security not only for the sum certified to be due, but also for the balance which might become due to the contractors down to the 13th of October, 1866. The next objection to the deed is, that the company had no power to assign the call in question. It is said that it purports to assign a future call. The call had been made, but the time for payment had not arrived. It was properly described by Mr. Mellish as a debt due, but not payable. The primary object for the application of the company's property is the payment of its debts; and I cannot understand why an assignment for that purpose of a debt due to the company should be held to be invalid. There is no authority that I am aware of for such a proposition. It clearly is not contrary to the powers of the company. Our attention has been

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called to the clauses in the general act and in the Devon and Somerset Railway Act regulating the borrowing powers of the company; and it was contended that the assignment of a call is contrary to the policy of the acts. The Companies Clauses Consolidation Act, 1845, however, in s. 43, expressly provides that in certain cases a future call may be assigned. This is not a case of borrowing: and there is no pretence for saying that there is any prohibition against the assignment of a call for the payment of debts. There are no special provisions as to the mode in which the company shall pay its debts. Why are we to imply a prohibition to the company to assign one debt due to them for the bonâ fide purpose of paying a debt justly due from them? I see no reason for it. Then it is said that the assignment was invalid because it contains a power for the assignees to sell the call at any time after the 13th of October. But, if this call was property of the company which they had power to assign, I do not see why the assignee might not sell it. It may be that this was an improvident contract for the directors to enter into, and might involve them in responsibility; or it may be that the assignees may render themselves liable to an action if they sell for less than a fair and reasonable sum. But, at all events, assuming the power of sale to be invalid, it seems to me that the only result would be that the deed as to this part of it would become inoperative; but that would not interfere with the rest of it. The last objection urged by the defendants' counsel was, that notice of the assignment must be given to the person whose debt is assigned, in order to make the assignment available as against a creditor. The validity of this objection turns upon the doctrine of the courts of equity. As between the assignor and the assignee, it is clear that no notice is necessary. As to third persons, there has been some difference of opinion; the majority of the Court of Queen's Bench, in *Watts* v. *Porter* (1), holding that the assignment without notice was inoperative as against a subsequent judgment-creditor; but the Lord Chancellor [Cranworth] and Lords Justices Knight Bruce, and Turner, in *Beavan* v. *Lord Oxford* (2), and the Master of the Rolls [Sir J. Romilly], in *Kinderley* v. *Jervis* (3)

(1) 3 E. & B. 743; 23 L. J. (Q.B.) 345.
(2) 6 D. M. & G. 492; 25 L. J. (Ch.) 299.
(3) 22 Beav. 1; 25 L. J. (Ch.) 538.

holding the contrary doctrine. It is unnecessary to raise that question upon the present occasion, because Lord Poltimore was a party assenting to the deed: he was acting as chairman at the board at which the seal of the company was directed to be put to it. It must be assumed, therefore, that what was done was done with his assent. But, if it were necessary to decide between this conflict of authority, I should have no hesitation in agreeing with the opinions of Erle, C.J., in *Watts* v. *Porter*, and of the Lord Chancellor, Lords Justices, and Master of the Rolls in the two chancery cases. I am therefore of opinion that all the objections fail, and that the plaintiff is entitled to judgment.

WILLES, J. I am of the same opinion. As to the first point, that this was an assignment to Messrs. Pickering without consideration or upon a consideration which has failed, that turns upon a question of fact, viz. whether the value of the materials (11,000*l.*) was within the deed, or whether the contract as to that might not have been a mere arrangement whereby the company were to have a lien upon the materials. It is not necessary to go into the second branch of the question; for, I am of opinion, upon the true construction of the deed, that it was quite competent to the engineer to certify for materials brought upon the line for the purpose of being used there. Then it was said that the assignment of the call was beyond the powers of the company, and therefore void, because it was to secure a debt which the company had incurred. But I see no reason why a debt due from the company should not be secured, or why they should not pay their creditors out of moneys arising from calls when received. Next, it is said that this deed contains a power so repugnant and wasteful, that it is impossible the legislature should have intended that the company should enter into such a bargain. I do not say that I am satisfied that the assignment would not be void if the power of sale could not be severed from the rest of the deed. Any attempt, however, to act upon that power in a manner which might be detrimental to the company, would be controlled by the Court of Chancery, who would expunge so much as is beyond the powers of the company, leaving the useful part of the deed untainted by the unavailing part. A distinction has been taken in this respect

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between a deed which is in part made void by statute, and one which is void in part by the common law. In *Maleverer* v. *Redshaw* (1), a sheriff's bond having been taken in a form other than that prescribed by the 23 H. 6, c. 9, it was objected that it was altogether void, the statute enacting "that bonds taken in any other form should be void:" but Twisden, J., said: "I have heard Lord Hobart say upon this occasion, that, because the statute would make sure work, and not leave it to exposition what bonds should be taken, therefore it was added that bonds taken in any other form should be void; for, said he, the statute is like a tyrant; where he comes he makes all void: but the common law is like a nursing father, makes void only that part where the fault is, and preserves the rest." But, after the long series of decisions on the subject, it is too late to make that distinction now. In truth, as was said by Wilmot, C.J., in *Collins* v. *Blantern* (2), "the common law is nothing else but statutes worn out." The distinction now applies only where the statute makes the deed void altogether. The general rule is that, where you cannot sever the illegal from the legal part of a covenant, the contract is altogether void; but, where you can sever them, whether the illegality be created by statute or by the common law, you may reject the bad part and retain the good. One of the series of cases of that sort is *Gaskell* v. *King* (3), where a covenant to pay rent and taxes was held not to be avoided by including property-tax. Another authority which may be referred to is *Payne* v. *Mayor, &c., of Brecon* (4), where the corporation had by a deed which was ultra vires borrowed money for a purpose to which the borough-fund was inapplicable, though the substance of the deed was held bad, yet the covenant for re-payment of the money was held to be good and capable of being enforced. *Bateman* v. *Mayor, &c., of Ashton* (5) is to the same effect. The last point is that notice to Lord Poltimore was necessary, and none was given. That turns upon this, whether the 61st section of the Common Law Procedure Act, 1854, intended

(1) 1 Mod. 35; 1 Sid. 456; 2 Saund. 78; 1 Vent. 39; 2 Keb. 536, 596, 625.

(2) 2 Wils. 341; 1 Smith's L. C. 6th ed. 325, 334.

(3) 11 East, 165.

(4) 3 H. & N. 572; 27 L. J. (Ex.) 495.

(5) 3 H. & N. 323; 27 L. J. (Ex.) 458.

to give the garnishee something more than the debtor himself was entitled to. But, as was pointed out by Mr. Mellish, there is no such language in the act. The opinion of the majority of the Court in *Watts* v. *Porter* (1) created an exception, on the 1 & 2 Vict. c. 110, s. 14, to the rule which applies generally, and which was applied in this Court more than a hundred years ago in the case of the statutory execution under the bankrupt law, that the creditors can have no more than the debtor was entitled to at law as well as in equity. But, since the cases of *Beavan* v. *Lord Oxford* (2) and *Kinderley* v. *Jervis* (3), it is open to grave doubts whether the opinion of Erle, C.J., in *Watts* v. *Porter* (1) was not the more correct one. (4) But, upon the construction of the 61st section of the Common Law Procedure Act, 1854, I think the defendants have failed to shew that any such exception was intended to apply to this case. Further, I think the fact fails; for, Lord Poltimore had notice. Upon the whole case, I agree with my Lord that the plaintiffs are entitled to judgment.

KEATING, J. I am of the same opinion. The reasons have been so fully gone into by my Lord and my Brother Willes, that I do not think it necessary to add anything.

MONTAGUE SMITH, J. I am of the same opinion.

Judgment for the plaintiffs.

Attorneys for plaintiffs: *Randall & Angier.*

Attorneys for defendants: *Bircham, Dalrymple, Drake, & Bircham.*

(1) 34 L. & B. 743; 23 L. J. (Q.B.) 345.
(2) 6 D. M. & G. 492; 25 L. J. (Ch.) 299.
(3) 22 Beav. 1; 25 L. J. (Ch.) 538.
(4) See *Robinson* v. *Nesbitt*, post 264.

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Jan. 30.

VANDERBYL *v.* SIR J. N. M'KENNA, KNT., AND OTHERS.

Arbitration—Amendment of Order of Reference—Order "by Consent"—Omission of Power to Amend—Striking out Parties, under 15 & 16 *Vict. c.* 76, *s.* 37.

It is not competent to the Court to amend an order of reference which has been drawn up "by consent," unless it be made manifest that there has been some omission on the part of its officer, or that by some accident or mistake the order is not in accordance with the intention of the parties, or that some fraud has been practised.

A consent order was drawn up in a printed form which contained no power to the arbitrator to amend:—

Held, that the order could not be amended by inserting therein a power to amend.

The plaintiff sued A., B., and C., upon a joint contract, and after plea entered a nolle prosequi as to B. and C., and, failing to prove a joint contract by the three, sought to amend the record by striking out of it the names of B. and C.:—

Held, per Bovill, C.J., not an amendment warranted by s. 37 of the Common Law Procedure Act, 1852.

THE first count of the declaration stated that, in consideration that the plaintiff would, on behalf of the defendants, enter into a contract in his own name as the principal contracting party, for the purchase of certain lands and houses for a large sum of money, and upon certain terms imposing heavy responsibilities and liabilities upon the plaintiff, the defendants promised and agreed to hold harmless from and indemnify the plaintiff against the said contract and all liabilities of the plaintiff thereunder: General averment that all conditions precedent were fulfilled, &c.: Breach, that, although the plaintiff was called upon and required to specifically perform the contract, and was under a liability by reason of the contract so to do, the defendants did not perform their promise to hold harmless or indemnify the plaintiff from or against the said liability or the damage thereinafter mentioned, but wholly repudiated their promise and their responsibility on account of the contract; and the plaintiff, by reason of his having the said liability enforced against him, was put to inconvenience and loss and damage, and had a bill filed in Chancery against him for the specific performance of the contract, the performance of which would have entailed great loss to the plaintiff; and the plaintiff, in order to prevent and diminish such loss, and in order to release himself from

the liability to perform the contract, was compelled to pay and did pay large sums of money, and was thereby damnified through his liability upon the contract.

There was also a count for money paid, interest, and money found due upon accounts stated.

The defendant pleaded, to the first count, that he did not promise, that the plaintiff did not enter into the contract, and that he (the defendant) did not make the said contract as alleged, and to the rest of the declaration never indebted.

The other defendants, Stock and Fernie, severally pleaded similar pleas, and also each a plea setting up a deed of inspectorship and release under the Bankruptcy Act, 1861, 24 & 25 Vict. c. 134.

The plaintiff joined issue on the pleas of M'Kenna, and entered a nolle prosequi as to the defendants Stock and Fernie.

The following were the particulars of the plaintiff's claim under the indebitatus count:—

"Money paid by the plaintiff to the vendors of the premises agreed to be purchased by the plaintiff for the defendants	£7000	0	0
"The costs of Mr. Crump, the plaintiff's solicitor, in and about the preparation of the conveyance of the said premises	141	16	0
"The like of the Chancery proceedings instituted against the plaintiff, consequent upon the breach of contract	73	0	0

The cause was set down for trial for the sittings after Trinity Term, 1867, but was made a remanet. On the 12th of August, in that year, the plaintiff and the defendant M'Kenna, without the intervention of their attorneys, agreed to leave the matter in dispute between them to the arbitrament of their respective junior counsel, viz. Mr. Watkin Williams and Mr. J. P. Murphy, and the following document was drawn up and signed by them:—

"Memorandum. *Vanderbyl* v. *M'Kenna.*

"We, the undersigned litigants in the above action, hereby agree to leave the question or questions in dispute between us to the arbitration of our junior counsel, Messrs. Williams and Murphy, with instructions to them to call in an umpire, if necessary, and such umpire to be agreed upon before the arbitration commences;

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and we hereby agree to accept the result of such arbitration as a final and complete settlement of all matters in dispute between us in this action."

A formal order of reference (the draft of which was settled and approved by the respective attorneys) was on the 28th of August drawn up in the cause, by consent, whereby it was ordered "that all matters of difference in this cause between the said Philip Vanderbyl and Joseph Neale M'Kenna be referred," &c.: but, the gentlemen named thinking it inexpedient that they should take upon themselves the character of arbitrators, it was ultimately arranged that the matters should be referred to another barrister; and accordingly a fresh order was drawn up on the 31st of October (the draft having, as before, been settled and approved by the respective attorneys), appointing Mr. Clark the arbitrator. Neither of these orders contained any power of amendment; such fresh order being also drawn in the cause by consent; and it was thereby ordered that "all matters in difference in this cause between the plaintiff and the defendant M'Kenna be referred," &c.

When the case came before the arbitrator, it was opened by the plaintiff's counsel as one of joint liability of the three defendants; and the plaintiff swore that he, on the 22nd of December, 1865, entered into a written contract for the purchase of a property in Bury Street, St. Mary Axe, for 32,000*l.*; that, in doing so, he had acted as the agent of the three defendants; and that he was under no circumstances to find any money, but was to have one-fourth of any profit which should be made out of the speculation, for his trouble, and to be held harmless from all liability. For the defendant M'Kenna it was contended that there was no joint liability between himself and the other two defendants; and that the legal effect of a nolle prosequi as against one or more of several joint contractors was, to discharge all the defendants. The plaintiff's counsel then proposed that the record should be amended by limiting his claim against M'Kenna to one-third. The arbitrator, however, though he intimated an inclination to do so if he could, said that the order of reference gave him no power to amend.

Watkin Williams, on a former day in this Term, obtained a rule calling upon the defendant M'Kenna to shew cause why the writ of

summons and the declaration and all other proceedings in this cause should not be amended by striking out therefrom the names of Stock and Fernie and all the pleadings relating to them, and why the record should not be in like manner amended so as to limit the claim to M'Kenna's share; and why the entry of the nolle prosequi should not also be struck out of the record; or why the order of reference should not be amended by inserting therein power to the arbitrator to amend; or why the order of reference should not be rescinded.

J. Browne, Q.C., and *Murphy*, shewed cause. The affidavit of Mr. Tatham, M'Kenna's attorney, contained amongst other things the following statements:—"At the time of pleading and subsequently it was a matter of discussion between me and my counsel whether the defendant could safely, if so inclined, with a view of avoiding all further litigation, pay into Court one-fourth of the plaintiff's alleged loss; and I was advised that it would be impossible to do so upon the declaration as framed, charging as it did a joint liability on the part of all three defendants to indemnify the plaintiff as their agent, and that it would be time enough to consider that question, in the event of the plaintiff abandoning that character." "I was all along advised by my counsel that the question of the defendant M'Kenna's separate liability for one-fourth could not possibly be raised in this action against the three defendants; and I never would have assented, had I been asked (which I was not), to give the arbitrator any power to adjudicate upon that question."

The Court has no power to do that which is asked by this rule: and, if they had the power, this is not a case in which it ought to be exercised. The matter which M'Kenna consented to refer was the plaintiff's right to recover upon the joint contract with the other two defendants and himself, as stated in the first count of the declaration. Prior to the 15 & 16 Vict. c. 76, s. 37, an amendment of the writ was never allowed, unless otherwise the claim would have been barred by the Statute of Limitations. In *Wickens* v. *Steel* (1), that section was held not to apply to a case where the party whose name was sought to be expunged had been joined, not by mistake or inadvertence, but designedly for the purpose of seeking to fix

(1) 2 C. B. (N.S.) 488.

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him with liability. Where a cause is referred *by consent*, no amendment is ever allowed, unless to further the intention of the parties, to correct a mistake, or supply an accidental omission, or in the case of fraud; *Morgan* v. *Tarte* (1); *Cross* v. *Metcalfe.* (2) *Gibbs* v. *Knightley* (3), which would seem at first sight an authority the other way, was a compulsory reference under s. 3 of the Common Law Procedure Act, 1854. To amend the order of reference would be altering the agreement of the parties,—per Parke, B., in *Wentworth* v. *Bullen* (4); *Lievesley* v. *Gilmore.* (5) The decision of this Court in *Thompsett* v. *Bowyer* (6) was based upon the peculiar terms of the order, which was, to refer "upon the usual terms," which was held to include the power to amend. *Wickens* v. *Steel* (7) shews that such an amendment as is here sought has never been made. And see Russell on Arbitration, 3rd ed. 80, et. seq. The question is what was the intention of the parties at the time the agreement of reference was entered into, and not what they would have done if, when they consented to it, the result of what they did was present to their minds: *Wilkinson* v. *Nelson.* (8) *Smurthwaite* v. *Richardson* (9), is precisely in point, and as nearly as possible identical in its circumstances with the present case. It was there held, that an amendment cannot be allowed so as to introduce a new cause of action, where a cause has been referred by consent under an order which does not reserve power to the arbitrator to amend; and that the Court will not permit a party to revoke the submission, in the absence of a suggestion of some breach of faith on the other side. "We have no power," said Erle, C.J., "to make the parties refer that which they never consented to refer."

Watkin Williams, in support of the rule. This is clearly a case in which the Court has power to amend the record under ss. 37 and 222 of the Common Law Procedure Act, 1852. The 19th section of the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126), shews the intention of the legislature on the subject. The declaration was framed as it is by reason of the doubt as to the true

(1) 11 Ex. 82.
(2) 5 Ad. & E. 800.
(3) 2 H. & N. 34.
(4) 9 B. & C. 840.
(5) Law Rep. 1 C. P. 570.
(6) 9 C. B. (N.S.) 284; 30 L. J. (C.P.) 1.
(7) 2 C. B. (N.S.) 488.
(8) 7 Jurist (N.S.) 480.
(9) 15 C. B. (N.S.) 463.

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character of the undertaking. The amendment of the order of reference which is sought here is not in violation of the rule laid down in any of the cases which have been referred to. In *Evans* v. *Senor* (1), Gibbs, C.J., says:—"The Court cannot add anything which requires the consent of the parties; but they can add that which the parties in the legal effect of their contract assented to." Where it is found that by misadventure the boundaries of the order are narrower than the parties really intended or must have contemplated, nobody can doubt the power of the Court to amend so as to meet the justice of the case. Here, the usual clause enabling the arbitrator to amend was omitted merely by reason of clerk at the judges' chambers using a printed form of order which does not contain it. (2) The reference here is, not of the cause only, but of "all matters in dispute between Vanderbyl and M'Kenna in this action." That is not limited by the precise issues on the record, but it includes any question which might be brought in by any amendment made by the judge at the trial.

[BOVILL, C.J. The declaration as it stands charges the three defendants as joint contractors. The plaintiff now seeks to charge one defendant only. Is that an amendment which a judge at nisi prius ought to make?]

It may be that what the plaintiff now seeks to raise is already really referred to the arbitrator. The plaintiff is not seeking to introduce a new cause of action, but to strike out two superfluous defendants.

[MONTAGUE SMITH, J. Because the contract which is now sought to be set up is not the contract which was originally declared on.]

The first count of the declaration, no doubt, shews an employment of the plaintiff as agent: but the declaration contains the common counts also.

[BOVILL, C.J. The particulars shew a claim as agent only.]

It would be idle to contend that the plaintiff meant to consent

(1) 5 Taunt. 662.

(2) The affidavit of the plaintiff's attorneys' clerk stated that, in the printed forms of orders of reference by consent used at chambers, those issued by Willes, Byles, and Montague Smith, JJ., in this Court, by Blackburn, J., in the Queen's Bench, and by Martin, B., in the Exchequer, do not contain a power of amendment; but that the orders issued by Keating and Shee, JJ., and by Pigott, B., do; and that the order in question was made by Willes, J.

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to a reference which would give the arbitrator a more limited power than the judge at nisi prius would have had.

BOVILL, C.J. The Court is asked in this case to exercise a power which it is said to possess, and which is of rather an extraordinary and extreme character. An action having been brought against three defendants, and a nolle prosequi entered as to two of them, the cause is referred by consent. The agreement of reference is short, and was originally made by the parties themselves, without the intervention of either counsel or attorneys. Their solicitors afterwards carefully prepared an order of reference to carry out what they understood to be the intention of their respective clients. That order is intituled in the cause, and the statement in it of what was intended to be referred is, "all matters in difference in this cause between Philip Vanderbyl and Joseph Neale M'Kenna." This was a clear agreement by consent, the draft being prepared specially by the solicitor on the one side, and sent for the approval of the adverse solicitor; and the order was drawn up in accordance with the terms so settled and agreed to. Subsequently, it became necessary to appoint another arbitrator; and another order was drawn up describing the matter referred in the same terms. In neither of these documents,—in the informal one first drawn up, or that which was approved by the respective attorneys,—was there any power reserved to the arbitrator to make any amendment. Further, it is stated in the affidavit of Mr. Tatham, the attorney for M'Kenna, that, at the time of pleading, and subsequently, it was a matter of discussion between him and his counsel whether the defendant could safely, if so inclined, with a view of avoiding all further litigation, pay into Court one-fourth of the plaintiff's alleged loss; and that he was advised that it would be impossible to do so upon the declaration as framed, charging as it did a joint liability on the part of all three defendants to indemnify the plaintiff as their agent, and that it would be time enough to consider that question, in the event of the plaintiff abandoning that character. And, towards the conclusion of the affidavit, that gentleman further says: "I was all along advised by my counsel that the question of the defendant M'Kenna's separate liability for one-fourth could

not possibly be raised in the action against the three defendants; and I never would have assented, had I been asked, which I was not, to give the arbitrator any power to adjudicate upon that question." It is quite clear, from the course which this discussion has taken, that, if we were to make this rule absolute, we should be giving the arbitrator power to adjudicate upon the very question which Mr. Tatham swears he never would have consented to allow the arbitrator to take into his consideration. Where an order of reference is drawn up by consent, and it is made manifest to the Court that there has been some omission on the part of its officer, or that by some accident or mistake the order is not in accordance with the intention of the parties, it is agreed on both sides that the Court may make such amendment as will give effect to that which the parties have agreed to. If the Court could be satisfied here that the amendment asked for would carry out the intention of both parties, there might be some ground for the motion. But, after the affidavit which has been made, I am unable to come to the conclusion that it was ever agreed that the arbitrator should have power to determine the question now proposed. If we were to act upon the plaintiff's view of the case, we should be doing that which would not further the intention of the parties, but would be in direct contravention of that which one of them intended. Section 222 of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), was much pressed upon our attention by Mr. Watkin Williams with a view to shew that we are bound to make all such amendments as may be necessary for determining the real question in controversy between the parties. In *Wickens* v. *Steel* (1), however, it was held by this Court that that section does not apply to a case like this. In that view I entirely concur. Mr. Watkin Williams also cited cases where it has been held that the Court has power to alter an order of reference. In the case of mistake or accidental omission, or if any fraud were shewn, the Court would doubtless interpose, to prevent injustice being done: but, in all other cases, where the reference is by consent, the Courts have been extremely jealous of interfering with orders of reference, lest by so doing they should be making an agreement between the parties which they themselves would not have entered into. The

(1) 2 C. B. (N.S.) 488.

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case of *Smurthwaite* v. *Richardson* (1) is an extremely strong one, and decidedly adverse to the present plaintiff. There, the order of reference gave the arbitrator no power to amend; and it was sought to alter the order so as to enable him to dispose of a matter arising out of the same transaction. In the course of the argument, Erle, C.J., asks, "What evidence have you that it was in the contemplation of the parties to refer the matter as altered?" and he goes on to say, "It must be clearly made out to our satisfaction that it was intended to refer the matter which was proposed to be inserted." So far from finding anything like that in the present case, the affidavit I have referred to shews exactly the reverse. In giving judgment in that case, the Court say: "We have no power to make the parties refer that which they never wished to refer. We think the defendants had a right to look at the cause of action alleged in the declaration, and to refer that, and that they had a right to refuse to refer any question of liability arising out of the plaintiff's contract: nor will we give leave to revoke a submission unless satisfied that there has been a breach of faith on the other side." Various other authorities were referred to by Mr. Brown in the course of his argument; but *Smurthwaite* v. *Richardson* (1) is authority enough to govern our decision. Then, if we have no power to amend the order of reference, Mr. Watkin Williams suggests that we may do substantially the same thing under the 37th section of the Common Law Procedure Act, 1852. It seems to me to be a strong thing to say that we may under that section do indirectly that which we could not do directly. But, if we had power under s. 37 to do that which is here prayed, I for one should not be disposed to exercise it in this case. Two other persons, Stock and Fernie, were joined as defendants with M'Kenna, designedly and intentionally, in order to fix all three with liability. Stock and Fernie, though in one sense dismissed from the action, are still retained upon the record for the purpose of getting execution against M'Kenna for the entire claim. That appears to have been the claim at first put forward before the arbitrator. Mr. Williams says he opened the plaintiff's case rather loosely. I give him full credit for that; and no one who has heard this argument can fail

(1) 15 C. B. (N.S.) 463.

to see the prudence of that course. He, however, seems to have persisted in his claim for three-fourths of the 32,000*l.* until the end, as available against M'Kenna. The plaintiff, therefore, took his chance of succeeding in establishing the case he had to make out on the pleadings as they stood. In that it is admitted, for the purposes of to-day, that he has failed; for, it is upon the assumption that he has failed that we are now asked to interfere. Where a plaintiff has thus up to the last moment endeavoured to fix a joint liability on three persons, and, failing in that, seeks to alter his case by striking out the names of two, I agree with the Court in *Wickens* v. *Steel* (1) that that is not a case in which we ought to exercise the power of striking out the names of parties to the record. In that case, it is true, the application was made after verdict: but the principle of the decision equally applies here. It was contended on behalf of the plaintiff that the power proposed by one branch of this rule to confer upon the arbitrator, would only enable him to do that which would carry out the intention of the parties. On the other hand, it is insisted that it would be introducing a totally different cause of action. The character of the claim now sought to be introduced, as well as its amount, seem to me to be totally different from that which was first put forward. It is enough to say that the claim is so different in character as to make me hesitate, even if I thought we had the power to do so, to accede to this application. Upon the short ground, therefore, that this was a reference by consent, and that we have no power to alter the agreement of the parties unless it be for the purpose of carrying out their intention, I think this rule should be discharged, and discharged with costs.

KEATING, J. I am of the same opinion. One argument urged by Mr. Watkin Williams was founded on the express terms of the order of reference. It is not, he says, a mere reference of "the cause," but of "all matters in difference in the cause;" and he relies upon these words as giving the Court a larger power of amendment than it would have had if the reference had been of "the cause" only. I have failed to follow the learned counsel to the conclusion to which he invited us. If, as Mr. Williams sug-

(1) 2 C. B. (N.S.) 488.

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gests, the arbitrator had power to amend under those words, the plaintiff may have the benefit of the exercise of that power now. I desire not to be understood as intimating the slightest opinion that the argument is well founded. Like my Lord, I found my judgment in discharging this rule upon the simple ground that it calls upon the Court to change the order of reference, contrary to the consent of the parties. For the reasons given by the Chief Justice, I am clearly of opinion that the parties did not intend that this order should contain the power which is now sought to be inserted in it. If it could have been shewn that the proposed alteration would in truth carry out the real intention of the parties, I should have been ready to adopt the course which was adopted in this Court in the recent case of *Thompsett* v. *Bowyer*. (1) That which was sought to be introduced there fell clearly within what was understood as "usual terms," and therefore the amendment was allowed. Looking at the course taken in this case, and especially at the statement in Mr. Tatham's affidavit, I think it is impossible to come to the conclusion that the parties intended that the arbitrator should have the power of amendment suggested. We have no right to force upon the parties an agreement which they have not entered into. Upon that plain ground I concur in discharging this rule.

MONTAGUE SMITH, J. I am of the same opinion. This was a reference by the consent and deliberate agreement of the parties. We are in the first place asked to alter that agreement by inserting in it a clause which is not found in it. That is manifestly a power which the Court ought not lightly to assume. Although they may think they could have made a better agreement for the parties than they have made for themselves, they clearly have no right to do so. We have no more power to alter an agreement of reference than we or the Court of Chancery have to alter any other agreement. If, indeed, it could be shewn that there had been some mistake as to the real meaning of the parties, I should have been disposed to act upon the principle that the Court may, in the exercise of its equitable jurisdiction, interfere to correct such mistake, in order that justice may not be defeated. The

(1) 9 C. B. (N.S.) 284; 30 L. J. (C. P.) 1.

courts have repeatedly acted upon this view. In *Thompsett* v. *Bowyer* (1), Erle, C.J., expressly says that the parties to an agreement of this nature have a right to make what bargain they please, and that the Court has no power to add to or subtract from what they have so mutually agreed. It was only upon the ground that the order in that case contained a stipulation that the reference was to be "upon the usual terms," that the Court felt itself justified in making the rule absolute. That being so as to the agreement of reference, it seems to me that the application to amend the pleadings must be governed by the same principle. I see no difference between an agreement to refer "the cause," and an agreement to refer "the matters in difference in the cause." In *Wild* v. *Holt* (2), Parke, B., says: "I cannot understand the difference between 'the cause' and 'the matters in difference in the cause,' they depend altogether on the issues raised in the cause." Here, the parties have agreed to refer the issues raised in the cause; and the application is, not only to alter those issues, but to change the cause of action,—to strike out of the record two of the defendants, and to enable the plaintiff to put forward a cause of action in which the third defendant was to be solely liable, instead of one in which he was liable jointly with the other two. That is clearly not what the parties have agreed to refer. I, therefore, agree with the rest of the Court that the rule should be discharged, with costs.

Grantham, for the defendants Stock and Fernie, asked that they might have their costs of opposing the rule, they having been made parties to it.

Watkin Williams, contrà, suggested that their appearance was unnecessary, though he was not instructed to oppose their application for costs.

PER CURIAM. Stock and Fernie were necessarily made parties to the rule. This was an experimental application, and the rule must be discharged with costs generally.

Rule discharged, with costs.

Attorneys for plaintiff: *Freshfields.*

Attorneys for M'Kenna: *William Tatham & Sons.*

Attorney for Stock and Fernie: *W. A. Crump.*

(1) 9 C. B. (N.S.) 284; 30 L. J. (C. P.) 1, 2. (2) 9 M. & W. 161, 165.

7 Jur NS 248.

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Jan. 31.

CROW AND ANOTHER, APPROVERS; ROBINSON, PLAINTIFF; REEVES AND ANOTHER, GARNISHEES; NESBITT, DEFENDANT.

Lord Mayor's Court—Attachment—Equitable Assignment of Railway Shares—Notice to Garnishee.

A prior equitable assignment of railway shares in the hands of the garnishee, is a bar to an attachment from the Mayor's Court, London, notwithstanding that no notice of such assignment has been given to the garnishee.

THE plaintiff was the holder of three bills of exchange of which the defendant was either acceptor or indorser, and which became due respectively on the 5th, 6th, and 9th of August, 1867. Having learned that Messrs. Reeves & Whitburn had received from the defendant certain shares in the Riga and Dunaborg railway as security for a loan, the plaintiff on the 6th, 7th, and 10th of August, the days respectively following the maturity of the bills, obtained garnishee orders against those gentlemen for the amount of the several bills. The approvers, the Rev. Mr. Crow and his daughter, were the cestuis que trust under the former's marriage-settlement, under which the defendant was the surviving trustee.

The bill of proof stated, that, before the said goods and chattels, being thirty shares in the Riga and Dunaborg Railway Company, numbered 16671 to 16700, being in the hands and custody of W. Reeves and C. Whitburn, were or any part thereof was attached and defended &c. as aforesaid, to wit, on the 7th of June, 1867, the defendant P. R. Nesbitt agreed with the said approvers that the said shares, which were and are shares transferable by delivery, should or might be received and held by them (after satisfaction of a certain lien thereon of the said W. Reeves and C. Whitburn, which lien has since been fully satisfied and discharged by the said approvers, to wit, on the 16th of August, 1867,) as security for the replacing or making good by the said P. R. Nesbitt of certain 3 per cent. Consolidated Bank Annuities, to wit, 1357*l.* 19*s.* 3*d.* 3 per cent. Consolidated Bank Annuities, which have not nor has any part thereof hitherto been replaced or made good, and whereof the said P. R. Nesbitt has been possessed upon certain trusts, and which then ought to have stood in his name in the books of the governor and company of the Bank of England, in trust for the

said approver F. A. Crow for his life, and, after his decease, in trust for the benefit of the said approver E. M. Crow, her executors, administrators, and assigns, and which said trust-fund had been before then sold and disposed of by the said P. R. Nesbitt in breach of the said trust, and the proceeds of such sale applied in the payment of calls upon the said shares: and the said defendant then transferred the property of the said shares, subject to the said lien, to the said approvers, whereof the said W. Reeves and C. Whitburn had notice before any of the times when the said goods, chattels, and shares were or any part thereof was attached as aforesaid, and the said goods, chattels, and shares so attached as aforesaid were not, nor was any part thereof, the goods, chattels, or shares of the said defendant when so attached as aforesaid, and then were the goods, chattels, and shares of the said approvers: and the said approvers claim to be admitted to prove the premises according to the custom of the city of London.

The plaintiff replied that the defendant P. R. Nesbitt did not agree with the said approvers in manner and form as alleged by the said approvers in their said probation, but, on the contrary thereof, the said goods, chattels, and shares so attached as aforesaid were and are the proper goods, chattels, and shares of the said defendant, and are not the property of the said approvers: and this the plaintiff prayed might be inquired of by the country, &c.

The joinder of issue was as follows:—And the said approvers F. A. Crow and E. Crow, as to the said replication of the said plaintiff J. Robinson by him above replied, and whereof he hath put himself upon the country, do the like.

At the trial before the Recorder, in the Lord Mayor's Court at Guildhall, on the 30th of November last, in support of the approvers' case it was proved that many years ago a sum of 2700*l.* 3 per cent. Consols had been purchased in the name of the defendant as trustee under the marriage-settlement of the Rev. Mr. Crow, in trust for that gentleman for life, and, after his decease, for the benefit of his daughter. This stock was sold out by the defendant, and the proceeds were invested by him in Riga and Dunaborg railway shares, some of which got into the hands of one Gurney; and the defendant and Gurney pledged them with the garnishees.

In consequence of an application by Mr. Malleson, the attorney

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of the approvers, for a transfer of these shares to them, the defendant gave an order, dated the 7th of June, 1867, addressed to Gurney and to Reeves and Whitburn, for the delivery of "my 97 Riga and Dunaborg railway shares" to Mr. Malleson. This order was shewn to the garnishees on the 16th of August, when they gave up 67 of the shares, retaining the other 30 shares; and Mr. Malleson upon the order wrote the following memorandum:—

"Received this 16th day of August, 1867, sixty-seven of the ninety-seven Riga and Dunaborg railway shares mentioned on the other side; the remaining thirty shares being left with Messrs. Reeves and Whitburn to answer the attachments by Mr. J. Robinson for together 350*l.*, in case he should proceed therein. This arrangement is not to prejudice the attachments. J. N. Malleson.

"Shares numbered 16603 to 16669, both inclusive."

Whitburn, who was called as a witness, stated that Reeves and himself obtained possession of the shares in June last, as security for a sum of money advanced by them to the defendant and Gurney; and that they (the garnishees) did not know before the issuing of the attachments that Mr. Malleson, or the approvers, had any authority from the defendant to receive the shares.

The Recorder said that there was no legal transfer of the shares by the order, and that notice (to the garnishees) of the assignment was necessary, in order to bar the attachment. He thereupon directed a verdict to be entered "that the approvers take nothing by their bill;" but he reserved them leave to move.

Tindal Atkinson, for the approvers, on the fourth day of this term, obtained a rule nisi to enter a verdict for them, or for a new trial on the ground that the learned Recorder misdirected the jury in telling them that there was no vesting of the property in the shares in the approvers, so as to bar the attachment.

Butler Rigby shewed cause. The direction was right. There was no notice to the garnishees of the alleged assignment, and therefore there could be no bar to the attachment: Brandon's Practice, title Attachment. An equitable assignment operates nothing without notice.

[WILLES, J. *Westoby* v. *Day* (1) was the first case which held,

(1) 2 E. & B. 605; 22 L. J. (Q.B.) 418.

as to foreign attachment, that which had been before held as to bankruptcy, viz., that there must be a debt as well at law as in equity. The return made there was that it was not within the custom. The question depends on whether or not *Watts* v. *Porter* (1) is law. That case was overruled virtually here the other day, in *Pickering* v. *Ilfracombe Railway Company* (2), having already been much shaken by the opinions of Lord Cranworth and the Lords Justices in *Beavan* v. *Lord Oxford* (3), and of the Master of the Rolls in *Kinderley* v. *Jervis.* (4)]

The memorandum of the 7th of June was merely an order to deliver the shares.

[MONTAGUE SMITH, J. In furtherance of an agreement to do so.

BOVILL, C.J. You must make out that the approvers had no equitable right.]

At all events, the Court will only make the rule absolute for a new trial, the plaintiff's case not having been gone into.

Tindal Atkinson, for the approvers, was not called upon.

BOVILL, C.J. I am of opinion that no notice was necessary in this case, and that there was a good equitable assignment of the shares to the approvers. *Watts* v. *Porter* (1) no doubt was in the mind of the Recorder: but the opinion of the majority of the Court in that case is no longer law. The rule must be made absolute for a new trial.

WILLES, J. If *Watts* v. *Porter* (1) was wrong, as we must now assume it to have been, no notice was necessary. That case arose upon an execution, under the 1 & 2 Vict. c. 110, s. 14. A custom to attach such a debt would à fortiori be bad.

KEATING and MONTAGUE SMITH, JJ., concurred.

Rule absolute accordingly.

Attorneys for the approvers: *Wadeson & Malleson.*

Plaintiff in person.

(1) 3 E. & B. 743; 23 L. J. (Q. B.) 345.

(2) Ante, p. 235.

(3) 6 D. M. & G. 492; 25 L. J. (Ch.) 299.

(4) 22 Beav. 1; 25 L. J. (Ch.) 538.

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Feb. 10.

FUENTES AND ANOTHER *v.* MONTIS AND ANOTHER.

Factors Acts, 6 *Geo.* 4, *c.* 94, *and* 5 & 6 *Vict. c.* 39—*Authority of Factor to Pledge Goods—Revocation.*

An agent "intrusted with and in possession of" goods, or of the documents of title to goods, within the Factors Acts, is a person who is intrusted as agent for sale; and consequently one whose authority has been revoked cannot make a valid pledge of goods which had been intrusted to him for sale, but which he has wrongfully retained after his authority has been revoked, and the goods demanded from him by his principal.

5 H. L. 118
9 C. B. 481, 2
485, 493,
497
10 C. B. 354
354, 373
5 C. L. D. 213
2 C. P. D. 228
4 C. L. D. 58

affd. Ex. Ch. 4 C. B. 93.

THIS was an interpleader issue directed to try the right to fifteen butts of Montilla sherry upon which the defendants claimed a lien for an advance of money under the Factors Acts.

At the trial before Blackburn, J., at the last Surrey summer assizes, the following facts were proved or admitted:—The plaintiffs are wine-merchants at Cordova, in Spain. The defendants are general merchants in London. In the year 1864, the plaintiffs sent to one Salustiano de Ponte, in London, thirty casks of Montilla wine for sale at 2½ per cent. commission and 5 per cent. del credere. Some of the wine was sold by de Ponte, but no proceeds were remitted to the plaintiffs. Disputes having arisen between the plaintiffs and de Ponte, in December, 1865, the plaintiffs wrote to Messrs. Collier, Brothers, wine-merchants at Plymouth, constituting them sole agents for the sale of their wines in England. Inclosed in this letter was one addressed by the plaintiffs to de Ponte, desiring him to deliver the wines remaining in his hands unsold to Messrs. Collier. Some correspondence ensued between de Ponte and Messrs. Collier; and ultimately, on the 31st of January, 1866, the plaintiffs sent through Messrs. Collier, the following letter to de Ponte:—

"We have learned through Messrs. Collier, Brothers, of Plymouth, that our wines in your hands had not been received by them, because you objected to their delivery until receiving a letter from us. We cannot understand this objection, when through the medium of said gentlemen you will have received our letter of the 4th of December, in which we authorized you to make the delivery to the aforesaid gentlemen. You must per-

fectly apprehend that your conduct has placed us in the compromise up to the present time of preventing us fulfilling what is arranged with the Messrs. Collier, who, for the reason of being the only agents for the sale of our wines in England and Ireland, should some days ago have had charge of the stocks in your possession. The aforesaid gentlemen have ample powers from us duly authorized to receive our wines from you; and we feel sure that on receipt of the present you will make no difficulty in delivering the nineteen butts in your possession, thus saving us the compromise in which we see ourselves placed, and which at any cost we are determined to end."

A formal demand of the wines was afterwards made on behalf of the plaintiffs, but de Ponte refused to deliver them up until the accounts between the plaintiffs and himself had been settled; and he claimed to have a lien upon them for freight and charges which he had paid, and also for damages which he might possibly be liable for at the suit of persons to whom he had sold a portion of the wine, and which he represented to have turned out to be unmerchantable. It did not appear that de Ponte had made any advances, and he had, in fact, no lien on the wine.

On the 19th of February, 1866, de Ponte obtained from the defendants an advance of 367*l.* 10*s.* upon the security of the dock-warrants (which had been made out in his own name) for fifteen butts of the wine in question, giving the defendants at the same time a memorandum, as follows:—

"In consideration of your advancing to me the sum of 367*l.* 10*s.* by a bill at sixty days date drawn by me on you, I undertake to deposit warrants with you for fifteen butts of sherry as security for the same; it being understood that, if at the end of the said two months I have not put you in funds to meet your acceptance, with interest and all charges incurred upon the wines, you are also at liberty in such case to charge a commission of 5*s.* for the sale of the wines."

The defendants afterwards discounted the bill for de Ponte, giving him two cheques for 235*l.* and 127*l.* 8*s.* 6*d.*, respectively, which were duly honoured. There was no question as to the bona fides of the advance, the defendants being ignorant of the fact of de Ponte being possessed of the dock-warrants as an agent.

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The learned judge intimated an opinion that de Ponte was on the 19th of February, 1866, no longer intrusted with the wines, though he had been so before; and he directed a verdict for the plaintiffs, reserving leave to the defendants to move that the verdict might be entered for them.

C. Pollock, Q.C., in Michaelmas Term last, obtained a rule nisi to enter a verdict for the defendants, on the grounds,—first, that the advance made by the defendants was protected by the Factors Acts, even if de Ponte's authority had been revoked,—secondly, that no revocation of de Ponte's authority had taken place which could affect the defendants' rights,—thirdly, that, apart from the Factors Acts, de Ponte had been so held out by the plaintiffs to the defendants as owner of the wine and warrants as to entitle the defendants to the verdict.

Sir G. Honyman, Q.C., and *Channell*, shewed cause. The only question is, whether, after his authority has been revoked, and possession of the goods has been demanded, the agent can make a valid pledge of them. Being employed to sell, the agent bound his principal by a sale, at common law; but he could not pledge: Smith's Mercantile Law, 7th ed. 132. The strict rule of the common law being found productive of hardship, the first Factors Act, 4 Geo. 4, c. 83, was passed to remedy the evil. It recited that "it had been found that the law, as it then stood, relating to goods shipped in the names of persons who were not the actual proprietors thereof, and to the deposit or pledge of goods, affords great facility to fraud, produces frequent litigation, and proves in its effects highly injurious to the interests of commerce in general." It then proceeded to enact that "any person or persons intrusted for the purpose of sale with any goods, &c., and by whom such goods, &c., shall be shipped in his, her, or their own name or names, or in whose name or names any goods, &c., shall be shipped by any other person or persons, shall be deemed and taken to be the true owner or owners thereof, so far as to entitle the consignee or consignees of such goods, &c., to a lien thereon in respect of any money or negotiable security or securities advanced or given by such consignee or consignees to or for the use of the person or persons in whose name or names such goods, &c., shall be shipped,

or in respect of any money or negotiable security or securities received by him, her, or them to the use of such consignee or consignees, in the like manner to all intents and purposes as if such person or persons was or were the true owner or owners of such goods, &c.; provided such consignee or consignees shall not have notice, by the bill of lading for the delivery of such goods, &c., or otherwise, at or before the time of any advance of such money or negotiable security, or of such receipt of money or negotiable security in respect of which such lien is claimed, that such person or persons so shipping in his, her, or their own name or names, or in whose name or names any goods, &c., shall be shipped by any person or persons, is or are not the actual and bonâ fide owner or owners, proprietor or proprietors, of such goods, &c., so shipped as aforesaid." Then came the 6 Geo. 4, c. 94, the 2nd section of which enacts that "any person or persons intrusted with and in possession of any bill of lading, India warrant, dock-warrant, warehouse-keeper's certificate, wharfinger's certificate, warrant or order for delivery of goods, shall be deemed and taken to be the true owner or owners of the goods, &c., described and mentioned in the said several documents hereinbefore stated respectively, or either of them, so far as to give validity to any contract or agreement thereafter to be made or entered into by such person or persons so intrusted and in possession as aforesaid with any person or persons for the sale or disposition of the said goods, &c., or for the deposit or pledge thereof as a security for any money or negotiable instrument or instruments advanced or given by such person or persons upon the faith of such several documents or either of them: provided such person or persons shall not have notice by such documents or either of them, or otherwise, that such person or persons so intrusted as aforesaid is or are not the actual and bonâ fide owner or owners of such goods, &c., so sold or deposited, or pledged as aforesaid." It was held by the Court of Exchequer in *Phillips* v. *Huth* (1), and afterwards by the Exchequer Chamber and the House of Lords in *Hatfield* v. *Phillips* (2), that it does not necessarily follow that the factor is intrusted merely because he is found in possession of the symbol of title: it must be shewn that the principal really intended that the

(1) 6 M. & W. 572. (2) 9 M. & W. 647; 12 Cl. & F. 343.

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factor should be possessed of the goods at the time he pledges them. To remedy that, the 5 & 6 Vict. c. 39 was passed. The 1st section, reciting, amongst other things, that "advances on the security of goods and merchandize have become an usual and ordinary course of business, and it is expedient and necessary that reasonable and safe facilities should be afforded thereto, and that the same protection and validity should be extended to bonâ fide advances upon goods and merchandize as by the recited act [6 Geo. 4, c. 94] is given to sales, and that owners intrusting agents with the possession of goods and merchandize, or of documents of title thereto, should, in all cases where such owners by the recited act or otherwise would be bound by a contract or agreement of sale, be in like manner bound by any contract or agreement of pledge or lien for any advances bonâ fide made on the security thereof," enacts that "any agent who shall thereafter be intrusted with the possession of goods, or of the documents of title to goods, shall be deemed and taken to be owner of such goods and documents, so far as to give validity to any contract or agreement by way of pledge, lien, or security bonâ fide made by any person with such agent so intrusted as aforesaid." And then there is a proviso in s. 4, that "an agent in possession of such goods or documents shall be taken, for the purposes of this act, to have been intrusted therewith by the owner thereof, unless the contrary can be shewn in evidence." The plain meaning of the 6 Geo. 4, c. 94, s. 2, as expounded by the 5 & 6 Vict. c. 39, is, that, to render the pledge valid, the agent must be in possession of and intrusted with the goods for sale at the time he pledges them.

[WILLES, J. The question is whether "intrusted" means "having been intrusted."]

The 5 & 6 Vict. c. 39 does not alter the rule laid down by the Exchequer in *Phillips* v. *Huth* (1), that there must be an intention on the part of the principal to intrust the factor at the time of the pledge. This Court, in *Bonzi* v. *Stewart* (2), assume the true construction of the statutes to be as suggested. The authority of the factor was much discussed in *Smart* v. *Sandars*. (3) Suppose the case of goods pledged with a factor, and not delivered to him in

(1) 6 M. & W. 572.

(2) 5 Scott, N. R. 1; 4 M. & G. 295.

(3) 5 C. B. 895.

his business as a factor for sale, and a third person makes an advance to the factor thereon,—is it to be said that the lender's claim on the goods is to prevail, though it is shewn that the factor was not "intrusted" therewith for sale? The authority to pledge is very analogous to the order and disposition doctrine under the bankrupt law: the consent of the true owner must exist down to the time of the bankruptcy.

C. Pollock, Q.C., and *Archibald*, in support of the rule. The general principles of justice which gave birth to the course of legislation known by the name of the Factors Acts, is well illustrated by two notes of learned American commentators, the one in 2 Kent's Commentaries, 628 (10th ed. 868), the other in Story on Agency, § 113, and by the judgments of Abbott, C.J., in *Dyer* v. *Pearson* (1), and of Best, C.J., in *Williams* v. *Barton*. (2) The intention of the Factors Acts evidently was to give effect to all acts which the factor has been enabled to do in consequence of his having been intrusted with the possession and apparent ownership of the goods. As against the person who has bonâ fide advanced money upon the security of the goods, it is the original intrusting which is the governing matter. It is somewhat remarkable that the word "agent" does not occur in the 4 Geo. 4, c. 83. The ground of the judgment of the Court of Exchequer in *Phillips* v. *Huth* (3) was that the factor could not be said to have been intrusted with a document which at the time had no existence. He had been intrusted with the bill of lading; but he obtained the dock-warrant by fraud. It is not denied here that, but for the revocation of de Ponte's authority, he would have had full power to deal with the wines by sale or by pledge. He was an agent for sale; and he was intrusted with and in possession of the documents of title, which were made out in his own name. He was the apparent owner of the goods, and the money was advanced to him by the defendants upon the faith of such apparent ownership. The only question is whether the revocation of his authority as agent, uncommunicated to the bonâ fide lenders of the money, takes the case out of the principle of the Factors Acts. Those acts were passed for the very purpose of enabling the factor to do

(1) 3 B. & C. 38, 42. (2) 3 Bing. 139, 145.

(3) 6 M. & W. 572.

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what otherwise he would not have been entitled to do. De Ponte had been intrusted by the plaintiffs with the wines as an agent for sale, and was in possession of the documents of title, and therefore clearly within the spirit and meaning of the acts, notwithstanding a secret revocation of his authority. He was in possession by reason of his having been intrusted. The legislation upon this subject has been throughout a struggle on the part of the legislature to do justice to innocent persons bonâ fide advancing money upon goods of which the concealed owners have enabled third persons to become the apparent owners, and so obtain credit in the commercial world. The 4 Geo. 4, c. 83, did not authorize the factor to pledge. The 6 Geo. 4, c. 94, remedied that omission; and the 5 & 6 Vict. c. 39, was passed for the purpose of curing one of the infirmities of that act, as pointed out in *Phillips* v. *Huth*. (1) The last-mentioned statute generally protects persons dealing with the agent, even though they may have known at the time that he was only an agent,—it protects the innocent lender where the documents of title have been once intrusted to the agent, and remain in his possession at the time of the advance. Every principle of natural justice dictates that one who induces another to act upon the faith of the existence of a given state of things, shall not be permitted afterwards to turn round and rely upon another and a different state of things. That is well illustrated by *Pickard* v. *Sears* (2) and the cases as to forged cheques and bills of exchange. (3) The true result of the 1st and 4th sections of the 5 & 6 Vict. c. 39, is that, if the agent is in actual possession of the goods or of the documents of title, it is sufficient that he shall have been intrusted therewith by the owner, unless the contrary can be proved in evidence. The 6th section contemplates the agent acting malâ fide, and the person advancing money by way of pledge on the goods being yet protected; for, an agent who, in violation of his duty, makes a deposit or transfer of any goods or documents of title "so intrusted to him as aforesaid," as and by way of a pledge, lien, or security, is to be deemed guilty of a misdemeanor. (4) In order to protect persons dealing with the agent, it is enough to shew that he was once intrusted, and that his pos-

(1) 6 M. & W. 572.
(2) 6 Ad. & E. 469.
(3) *Young* v. *Grote*, 4 Bing. 253.
(4) See 24 & 25 Vict. c. 96, s. 78.

session continues. No sort of circumspection could have availed the defendants here. No inquiry would have enabled them to learn that de Ponte had no right to dispose of the wines as he did. And, if one of two innocent persons must suffer from the fraud of a third, it should manifestly be he who by his laches or his misplaced confidence has enabled the third person to commit the fraud.

WILLES, J. In this case, the plaintiffs, Messrs. Fuentes, had consigned a quantity of wine to a person named de Ponte, for sale. When he received the wines, de Ponte was, no doubt, and for some time afterwards continued to be, an agent in possession of and intrusted with the wines, so as to come within the provisions of the Factors Acts. Messrs. Fuentes became dissatisfied with his conduct as agent, appointed Messrs. Collier to act for them in that capacity, and gave de Ponte to understand that his agency was at an end, and required him to hand over the wines remaining in his hands to Messrs. Collier. De Ponte refused to comply with this request, and refused without any good reason, because he appears to have had no claim against Messrs. Fuentes by way of lien or otherwise. It was his duty as agent to give up the wines; and, in retaining the documents of title (which for the purposes of the Factors Acts are the same as the goods themselves), he was guilty of a wrong. That state of wrongful possession by de Ponte continued for some time after the revocation of his authority and the demand of the wines and the documents of title on behalf of Messrs. Fuentes; and during that wrongful possession, and after the revocation of his authority as agent, de Ponte obtained an advance on the security of the documents of title, which advance would have been protected by the Factors Acts, and effectual to give the lenders, Messrs. Montis, a valid pledge of the documents of title to the wines, supposing there had been no revocation of de Ponte's authority. The question, therefore, is neatly raised, whether an agent who has once been intrusted with and remains in possession of goods or the documents of title thereto, continues to have authority quoad third persons who bonâ fide make an advance, so as to give them a title as against his principal, notwithstanding that before the right of the lender arises the authority

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which the agent had has been revoked, so that, as between himself and his principal, he has ceased to be an agent, and has become a person occupying the relation simply of a wrongdoer in detaining the goods or the documents of title. That question has been argued before us with great acumen, and we are much indebted to the learned counsel on both sides for the assistance we have received from them. The question is one of considerable nicety. But, as we have had an opportunity of thinking it over, we consider it right to pronounce our opinion upon it at once. It is a question of nicety, not only as depending on the construction of the acts of parliament relating to factors, but also because it belongs to a class of questions upon which great differences of opinion have existed amongst mercantile men, though not amongst lawyers; that is, the class of questions which relate to how far a person who is not the real owner of goods, but who appears to the world, or rather to those who deal with him, as owner, and who deal with him on the faith of his apparent ownership, should be allowed to confer upon a third person a greater title than he himself has. With respect to certain sorts of property, everybody is agreed that there is no restriction of the power of the apparent owner to transfer a right to any person who takes it from him bonâ fide; as in the case of the ordinary currency of the country, or that which has for mercantile convenience been put upon the same footing, viz. bills of exchange and other negotiable instruments, including bills of lading, as against stoppage in transitu only. Every one is agreed that, with respect to the ordinary currency, and bills of exchange whilst running, a person who receives them bonâ fide and for value is entitled to hold them notwithstanding any infirmity of title in the person from whom he obtains them. That, however, is far from being so as to ordinary merchandize. The only cases which at the moment occur to my mind in which a man may give to another a better title to goods than he himself has, are, the case of a sale in market-overt, in which case the buyer acquires a title to the goods whatever may have been the right of the seller,—probably because of the publicity of the transaction and the inconvenience which would result from the adoption of any other rule. And even to this there are exceptions, arising out of the statute of restitution. A second case which may be put is the case of

a man selling goods under circumstances in which he might rescind the contract on the ground of fraud in the buyer: if the buyer has obtained possession, that possession as against the seller is wrongful; but if the buyer, before the seller has exercised his option of rescinding the contract, has sold the goods to a bonâ fide purchaser, such bonâ fide purchaser would be entitled to retain them as against the seller, notwithstanding the latter has been defrauded. A third case in which a man may convey a better title to goods than he himself had, and one which is more apposite to the present, is, where an agent who carries on a public business deals with the goods in the ordinary course of it, though he has received secret instructions from his principal to deal with them contrary to the ordinary course of that trade. In that case he has what has been sometimes called an apparent authority, or, as my Brother Byles more accurately calls it, an ostensible authority, to deal in such a way with the goods as agents ordinarily deal with them; and, if he deals with them in the ordinary way of the trade, he binds his principal. These instances, however, are exceptional to the rule that no man can give a better title to goods than he has himself, and that the real owner is not bound except to the extent of an interest which he has parted with or an authority which he has given. Now, the result of that state of the law with respect to agents employed to sell, led to the course of legislation which is known by the general description of the Factors Acts; because it was held by the courts of law that the case of a pledge of goods by a factor intrusted with the possession of goods, and authorized to sell them, fell within the general rule to which the instances above enumerated are exceptions, and that it did not fall within the exceptions by reason of a pledge being an ordinary and accustomed transaction to be entered into by a person intrusted as agent to sell, or perhaps more properly by reason of the courts of law having treated a pledge as being out of the scope of an authority to sell.

The legislature seem to have considered that to be too narrow a view of the proper scope of the authority of an agent to sell; and they were no doubt induced to think so by reason of the altered mode of conducting mercantile transactions in modern times, and because it had become a usual and accustomed course for factors

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intrusted with goods for sale, to make advances to their principals either in money or by the acceptance of bills against their consignments, and to keep themselves in funds by repledging the documents of title with bankers or other money dealers. But, whatever may have been the reason, it is clear that that was the particular evil which the legislature sought to remedy by the Factors Acts. And if it be proper, in construing a statute, to look at the mischief intended to be remedied,—which Lord Coke says is one of the rules for construction of acts of parliament,—one would construe such a statute with the expectation of finding that the legislature would deal with the class to which persons who in the usual course of business advance money on goods coming to them for sale belong, and who previously could not pledge beyond their own advances, because the authority of the agent, as between himself and his principal, was limited to contracts of sale, and not capable of being extended by construction to contracts of pledge. That anticipation of what the legislature intended by the Factors Acts, if we are to rely upon a series of decisions upon them, to some of which reference has been made, and all of which are in harmony, would turn out to be correct, because it has from time to time been held that, notwithstanding general terms used here and there throughout those acts, which, taken by themselves, might be held to include all agents or persons intrusted, those general expressions are to be construed with reference to the general scope and object of the acts as well as to the particular language used, so as to limit their operation to the case, first, of persons intrusted as agents. Take the case which it was sought at one time to bring within the operation of the acts, of a seller handing to the buyer a document of title,—it might be said that the buyer was a person intrusted with and in possession of the document of title, and, if he dealt with it in the ordinary course of business under the first or second of the Factors Acts he ought to give a complete title as against the seller. But one of the earliest decisions upon the construction of the 6 Geo. 4, c. 94, and a decision which has never been quarrelled with, is *Jenkins* v. *Usborne* (1), where it was held that the buyer in such a case is not a person "intrusted" or "in possession" within the meaning of

(1) 7 M. & G. 678.

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the act, because he was not intrusted as an agent, and therefore a person who buys from him a dock-warrant or other document of title, is, as against the seller, in no better position than the buyer himself, and so the right to stop in transitu is not excluded. Next it was held that, not only must the person be intrusted as agent, but he must be intrusted as agent in a mercantile transaction; and therefore a mere servant intrusted with a document of title, though an agent in one sense, is not so in the sense of the act, and therefore cannot, as against his master, give to another a right which he himself had not. Next, it appears that not only must the person intrusted be an agent, but he must be an agent for sale; and that would exclude the case of a carrier or warehouseman (1), who is in some sense an agent and intrusted with the possession of goods. The agents contemplated by the Factors Acts are agents intrusted for sale. I do not mean to limit the operation of the statute to agents intrusted with goods for future sale, either generally or in the particular instance. It is necessary to guard oneself in that respect, because every one is aware of the case of the commission-agent who informed the owners of goods that he had an opportunity of selling them, and, having got samples, represented that he had sold the goods to a person who it was afterwards discovered had no existence, and, having by that fraud got possession of the goods, pledged them to a third person, who made an advance bonâ fide and without notice of the fraud; and it was held that the latter acquired a good title to the goods under the Factors Acts. I allude to the case of *Baines* v. *Swainson* (2), which Mr. Channell evidently had in his mind when he made a very pertinent observation, which I shall refer to by-and-bye. The Court in that case laboured hard to shew that the person was intrusted with and in the possession of the goods as agent, and as agent for sale, though he was not when first intrusted an agent for the future sale of the goods, was still within the operation of the Factors Acts, because he was an agent for sale, and his employment was connected with the sale, as was put by Crompton, J. The Court took pains to shew that the judge who tried the cause, and who at first thought that, as the intrusting was not for sale generally, it

(1) *Monk* v. *Whittenbury*, 2 B. & Ad. 484.

(2) 4 B. & S. 270; 32 L. J. (Q.B.) 281.

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did not come within the Factors Acts, was wrong. That case, however, is strong to shew the extreme limit to which the Factors Acts have been pushed; and it was properly referred to for that purpose. But it is necessary not only to shew that the person intrusted is an agent and an agent for sale, but it is necessary also, as Mr. Channell pointed out, that he was intrusted with the particular goods as an agent for sale or for an object connected with the sale,—to avoid coming into collision with the case of *Baines* v. *Swainson* (1), to which I entirely assent.

Here it is necessary to consider the state of the law as to an agent intrusted with goods, but not for the purpose of sale, because it differs from that which relates to other agents. In the case of an agent whose general business it is to sell, being intrusted with goods for a purpose other than that of sale, as upon a pledge for an advance of money, with instructions not to sell; or, if he happen to have a warehouse, though his general business is that of a factor and not of a warehouse-keeper, and goods are placed in his warehouse at a rent: in either of these cases he would be a person who primâ facie would appear to be justified in dealing with the goods as factor; and yet there is an express provision as to such a person (for, one cannot doubt that the judges in *Baines* v. *Swainson* (1) were right in so expounding the section), that he shall be only primâ facie in a position to deal with his principal's goods more largely than as agent he could do, and that his principal may repel the presumption of his more enlarged authority under the Factors Acts, and shew the real nature of the transaction between them. That provision is (5 & 6 Vict. c. 39, s. 4), "an agent in possession of such goods or documents shall be taken, for the purposes of this act, to have been intrusted therewith by the owner thereof, unless the contrary can be shewn in evidence." That provision in the 4th section of the 5 & 6 Vict. c. 39, has been applied to the extreme by Blackburn, J., in his judgment in *Baines* v. *Swainson* (2), where he says,—"I do not agree with the counsel for the defendants, that the mere fact of an agent being found in possession of goods, although they have been handed to him by the owner knowing that he carries on such a business, amounts to

(1) 4 B. & S. 270; 32 L. J. (Q.B.) 281.

(2) 4 B. & S. 270, 285; 32 L. J. (Q.B.) 281, 288.

an 'intrusting' him as agent; though I think that, under that part of s. 4 of statute 5 & 6 Vict. c. 39, to which I have referred, the fact of a person being put into possession of goods calls upon the person who gave him possession to explain and shew that it was not an intrusting." But for that guidance, I might rather have inclined to read that last clause of the 4th section as applicable to the cases provided for in the previous part of it, and to be satisfied with the case in which the factor has been held to be intrusted with the possession of documents of title which he has been enabled to obtain by reason of his having been intrusted with other documents which led to the acquisition of the former. But I will not criticise the opinion there thrown out, but will adopt it for the purpose of the present case. Here is the case of an agent whose general business brings him within the scope of the act, who, being in possession of goods belonging to a principal, has pledged them. What is the result? Is it that a person who has innocently dealt with the agent by reason of his general character and employment, is to take advantage of the apparent ownership of the agent, as a buyer in market-overt would? or is he to be subject to some afterclap, some proof by the owner that he was not so intrusted as to bring him within the acts? Let the statute speak for itself. Its words are,—"an agent in possession as aforesaid of such goods or documents shall be taken, for the purposes of this act, to have been intrusted therewith by the owner thereof, unless the contrary shall be proved in evidence." The inevitable conclusion is, that, if the contrary can be proved in evidence, "an agent in possession as aforesaid of such goods or documents," is not to be taken to be "intrusted therewith by the owner thereof."

That introduces the argument which was urged on the part of the plaintiffs, and well illustrated by the case put by Mr. Channell, in which the claim of a person bonâ fide making an advance to the factor may be defeated. That is the case of goods pledged with a factor, but not intrusted to him in his business of a factor. I draw two conclusions from the state of the law of which I have endeavoured to give a summary, not dwelling for the present upon the precise language of the acts, but upon the construction which has been put upon them, with a view to see whether that construction enables us to come to a decision upon this case. The conclusion to

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which the course of the decisions compels me to come is that which is expressed by Blackburn, J., in *Baines* v. *Swainson* (1), viz. that the authority given by the Factors Acts quoad third persons is an authority superadded and accessory to the ordinary authority given by a principal to his agent. It was not intended by those acts to provide a remedy for all the hardships which may occur to innocent persons by dealing with one in the apparent ownership of goods as if he were the real owner; but only with cases where the agent is intrusted with and in possession of the goods with the assent of the true owner of them.

Much argument has been urged upon the words "intrusted and in possession." But it appears to me that, before you can deal with the state of being intrusted or in possession, you must get your substantive, viz. agent. The person who is to give a title as against the principal or owner of the goods must be an agent. If he has no right to the possession as agent, the provisions of the Factors Acts as to pledging do not apply to him.

I might desire that it was in the power of the judges to amend the law from time to time with reference to mercantile convenience. And, if there were a large preponderance of opinion amongst mercantile men that there ought to be a free power of transfer of goods by persons having the apparent ownership, I might feel disposed to exercise that power, if it had existed, in favour of the opinion of such majority. But, were I to do this, I should be doing an unconstitutional act. And I cannot help taking warning against interfering with the intentions of the legislature from any notions of expediency, when I recollect what took place in *Kingsford* v. *Merry*. (2) There, one Anderson falsely and fraudulently represented to the plaintiffs that he was authorized by and acting on behalf of Van Nottin & Co. in procuring certain goods, and the plaintiffs, in consequence of such false and fraudulent representation, delivered the goods to Anderson with intent to transfer to him the property in them, and Anderson pledged the goods with the defendant for a bonâ fide advance: and the Court of Exchequer held that the plaintiffs could not maintain an action for the goods without tendering or paying the defendant his advance,

(1) 4 B. & S. 270; 32 L. J. (Q.B.) 281.

(2) 11 Exch. 577; 25 L. J. (Ex.) 166.

upon the principle that (1), "when a vendee obtains possession of a chattel with the intention by the vendor to transfer both the property and possession, although the vendee has committed a false and fraudulent misrepresentation in order to effect the contract or obtain the possession, the property vests in the vendee until the vendor has done some act to disaffirm the transaction." But, when the case came before the Exchequer Chamber, the facts as they were stated for the opinion of the Court of error not sustaining the conclusion of fact upon which the Court below relied, the judgment was reversed. (2) The ground of the decision in the Exchequer Chamber was, that "the plaintiffs and Anderson never did stand in the relation of vendor and vendee of the goods, and that there was no contract between them which the plaintiffs might either affirm or disaffirm." Thus, the man who innocently advanced his money upon the faith of the apparent ownership of the goods in Anderson was held to have no title to the goods. Everybody is aware of the great attention which that case excited amongst mercantile men, and what a large amount of consideration and discussion ensued by men of great ability and reflection, especially as to the expediency of expanding the principle of the Factors Acts so as to meet the case of apparent ownership: and one cannot but remember that all that consideration and discussion failed to lead to any practical result; the law remaining as it was before. I am at all times anxious to give full effect to the intention of the legislature as expressed in the language they have used. But I do not feel myself at liberty, from any notions of expediency which I may entertain, to go beyond that which I find written. I therefore feel compelled to deal with the acts of parliament in question according to the expressions I find there, always bearing in mind that the substantive thing that is being dealt with is an agent. I take the 1st section of the 5th and 6th of the Queen,—"From and after the passing of this act, any *agent* who shall thereafter be intrusted with the possession of goods, or of the documents of title to goods, shall be deemed and taken to be the owner of such goods and documents, so as to give validity to any contract or agreement by way of pledge, lien, or security,

(1) 11 Exch. at p. 579; 25 L. J. (Ex.) at p. 168.

(2) 1 H. & N. 503; 26 L. J. (Ex.) 83.

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bonâ fide made by any person with such agent so intrusted as aforesaid, as well for any original loan, advance, or payment made upon the security of such goods or documents, as also for any further or continuing advance in respect thereof; and such contract or agreement shall be binding upon and good against the owner of the goods and all other persons interested therein, notwithstanding the person claiming such pledge or lien may have had notice that the person with whom such contract or agreement is made is only an agent." Where the word "agent" is not repeated, I assume that it must be read down. I therefore come to the conclusion that the person who is to create a valid pledge of his principal's goods must be an agent who is intrusted at the time of doing the act which is to have that effect. That being so, it appears to me that an agent whose authority has been revoked, and who wrongfully retains possession of goods which he is bound to give up, at the time when he purports to make a pledge, is not an agent at all, but a wrongdoer, and is not within the acts, nor is the pledge a transaction within their protection. It appears to me that the Factors Acts will be fully satisfied by holding the effect of them to be, that a man who places goods, or the documents of title to goods, in the hands of an agent for sale, or for a purpose connected with sale, shall be taken to have given the agent authority to pledge, and such authority continues so long as the agency continues; and that the authority given to the agent quoad third persons is an authority juris et de jure, superadded and accessory to the agency, and ceases when his possession as agent ceases. And I can no more come to the conclusion that a person who is "in possession," but who has ceased to be "intrusted," and ceased to be agent, can have a right to pledge so as to confer upon the pledgee the rights created by the Factors Acts, than I can come to the conclusion that a person who was "intrusted," but who has ceased to be "in possession," can have such right, which he clearly could not.

For these reasons, I am of opinion that Messrs. Montis had no right to hold the wines in question as against Messrs. Fuentes; and, having considered the case with all the anxiety which its novelty and nicety and the worth of the arguments which have been addressed to us demanded, I feel compelled to come to the

conclusion that the verdict for the plaintiffs ought to stand, and that the rule should be discharged.

KEATING, J. I am of the same opinion, though I must confess that my mind has undergone considerable fluctuation during the course of the argument. The case is novel, and of great importance. There can be no doubt that de Ponte was a person who was intrusted as an agent for sale, and in such a way that down to January, 1866, any pledge of the wines or of the documents of title made by him would have been valid as against his principals. And it is equally clear that his authority, as between himself and his principals, was determined and put an end to before the pledge in question was made. Then comes the question whether a pledge made after the authority of the agent has been revoked can be good. For the reasons given by my Brother Willes, in which I entirely concur, it seems to me, after consideration, that, in order to make a pledge effectual as against the principal, the party pledging must continue to be agent down to the time of the pledge. This is one of those unfortunate cases in which we have to determine which of two innocent persons shall suffer from the wrongful act of another. It seems to me that the law determines that question in favour of the plaintiffs, and that the rule must be discharged.

MONTAGUE SMITH, J. I should have been glad to have given a construction to the Factors Acts wide enough to include this case, because I certainly think that that which has occurred here falls within the very mischief against which, in some instances at least, the legislature meant to provide. But I am bound to construe the acts according to the language which the legislature has used; and I do not feel myself at liberty to insert words which are not found in those acts. The language of the 1st section of the 5 & 6 Vict. c. 39 is precise and limited. The governing words are, "any agent who shall thereafter be intrusted with the possession of goods or of the documents of title to goods." The act does not profess to give authority to those agents to deal with the goods in a way not authorized by their instructions; but it gives the same validity to their acts in certain cases as if they had authority. Still it is only an agent who is intrusted with the possession of the goods who may do those acts. Here, after the revocation of his authority

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as agent, and the demand of the goods by his principals, de Ponte ceased to be an agent so intrusted, according to the construction which must, I think, be put upon the acts. It is plain that the act was intended to have a limited effect; because it does not extend to "all persons" intrusted with the possession of goods, or to all "agents" intrusted with the possession of goods, though the word "agent" is certainly used in a singular sense. But, taking the act altogether, and reading it (with its preamble) by the light of the law as it stood at the time, and regard being had to the remedy intended to be given, it is clear that "agent" is to be taken in a limited sense, excluding, for instance, carriers and wharfingers, and factors not intrusted for sale. Upon these grounds, and for the reasons so elaborately given by my Brother Willes, though I regret that I cannot find language in the act to enable me to give it a construction which would embrace this case, I feel bound to come to the conclusion that de Ponte, at the time when he dealt with these goods as he did, was not agent of Messrs. Fuentes, or intrusted by them with the possession of the goods for sale.

Rule discharged.

Attorney for plaintiffs: *John Elliott Fox.*
Attorneys for defendants: *Head & Pattison.*

Jan. 15.

BRADLAUGH *v.* DE RIN.

*Bills of Exchange—Stamp—*17 *&* 18 *Vict. c.* 83, *s.* 5—*Burden of Proof.*

By the 17 & 18 Vict. c. 83, s. 5, it is provided that no person shall be entitled to recover in an action brought on any foreign bill of exchange unless it had upon it at the time it was transferred to him the stamp required by the act.

In an action on a foreign bill of exchange, the required stamp was upon the bill at the time of the trial, but no evidence was given to shew that it was on the bill at the time it was indorsed to the plaintiff:—

Held, that it must be presumed to have been so, the contrary not having been shewn by the defendant.

ACTION on three bills of exchange.

The case was tried before Montague Smith, J., at the sittings in London after last Michaelmas Term, when it appeared that the bills

were drawn abroad, accepted in England, and sent again abroad, when, after several intermediate indorsements, they were indorsed in Paris to the plaintiff. At the trial the stamps required by 17 & 18 Vict. c. 83, s. 5 (1), were upon the bills, but the plaintiff stated, in cross-examination, that he could not remember whether they were on the bills at the time he received them; and no other evidence on the subject was given. A verdict was found for the plaintiff, with leave to the defendant to move to enter a nonsuit or verdict for the defendant, on the grounds: first, that the plaintiff was bound to shew that the proper stamps were on the bills at the time he received them, in order to entitle himself to recover; and secondly, that the last indorsements were not valid according to the law of France.

Jan. 15. *Keane, Q.C.*, moved for a rule pursuant to the leave reserved. The 17 & 18 Vict. c. 83, s. 5, makes it a condition precedent to the plaintiff's right to recover, that the required stamps should have been on the bills at the time he received them; it was necessary, therefore, for the plaintiff to shew affirmatively that they were so, and this he has failed to do. [He contended also that the last indorsements were insufficient, according to French law.]

(1) 17 & 18 Vict. c. 83, s. 5:—"The holder of any bill of exchange drawn out of the United Kingdom, and not having a proper adhesive stamp affixed thereon as herein directed, shall, before he shall present the same for payment or indorse, transfer or in any manner negotiate such bill, affix thereon a proper adhesive stamp for denoting the duty by this act charged on such bill, and the person who shall indorse, transfer, or negotiate such bill shall, before he shall deliver the same out of his hands, custody, or power, cancel the stamp so affixed by writing thereon his name or the name of his firm, and the date of the day and year on which he shall so write the same, to the end that such stamp may not be again used for any other purpose; and if any person shall present for payment, or shall pay or indorse, transfer or negotiate any such bill as aforesaid, whereon there shall not be such adhesive stamp as aforesaid duly affixed, or if any person who ought, as directed by this act, to cancel such stamp in manner aforesaid, shall refuse or neglect so to do, such person so offending in any such case shall forfeit the sum of 50*l.*, and no person who shall take or receive from any other person any such bill as aforesaid, either in payment or as a security, or by purchase or otherwise, shall be entitled to recover thereon, or to make the same available for any purpose whatever, unless, at the time when he shall so take or receive such bill, there shall be such stamp as aforesaid affixed thereon, and cancelled in the manner hereby directed."

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BOVILL, C.J. On the second point you may take a rule; but with respect to the first, we think it would be very inconvenient for the plaintiff to be required to prove that the stamps were on the bills before their first indorsement to an English holder, as required by the act. There was primâ facie evidence that the act had been complied with, and it was for the defendant to give evidence to rebut that.

WILLES, KEATING, and MONTAGUE SMITH, JJ., concurred.

Rule refused on the first point, and granted on the second.

Attorneys for defendant: *Lewis & Watson.*

Jan. 28.

THE ILFRACOMBE RAILWAY COMPANY *v.* LORD POLTIMORE.

Scire facias—Companies Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 16), *s.* 36—*Assets of Company.*

The Court has jurisdiction under 8 & 9 Vict. c. 16, s. 36 (1) to order a writ of scire facias to issue against a shareholder upon a judgment obtained against a company, although there be property of the company which has not been taken in execution, if such property is not sufficient to satisfy the debt of the judgment creditor.

SPECIAL case stated without pleadings.

The following are the material facts:—The action was commenced by a writ of scire facias, issued by leave of the Court of Common Pleas on the 24th of November, 1866.

(1) 8 & 9 Vict. c. 16, s. 36:—"If any execution either at law or in equity shall have been issued against the property or effects of the company, and if there cannot be found sufficient whereon to levy such execution, then such execution may be issued against any of the shareholders to the extent of their shares respectively in the capital of the company not then paid up. Provided always that no such execution shall issue against any shareholder except upon an order of the Court in which the action, suit, or other proceeding shall have been brought or instituted, made upon motion in open court after sufficient notice in writing to the persons sought to be charged, and upon such motion such court may order execution to issue accordingly; and for the purpose of ascertaining the names of the shareholders and the amount of capital remaining to be paid upon their respective shares, it shall be lawful for

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The plaintiffs had recovered two judgments against the Devon and Somerset Railway Company for 10,500*l.* and 10,750*l.* respectively, and had issued under the latter judgment two writs of fi. fa. to the sheriffs of Devon and Somerset, to each of which there was a return of nulla bona; and they had also issued two writs of elegit to the same sheriffs, who had returned that there were lands in their bailiwicks of the annual value of 155*l.* and 105*l.* respectively, but no goods. In point of fact, however, the company was possessed of office furniture in the county of Somerset of the value of 150*l.*

The defendant was a holder of 200 shares in the Devon and Somerset Railway Company, on each of which there was 15*l.* unpaid.

The question for the Court was, whether the plaintiffs were entitled to execution against the defendant for any, and if so, for what amount.

J. Bridge (*Keane, Q.C.*, with him), for the plaintiffs. The returns made by the sheriffs were primâ facie evidence of the facts stated in them, *Gyfford* v. *Woodgate* (1), and justified the issuing of the writ of sci. fa.; and the existence of property is an answer, if to anything, to the issuing of the writ, and not to an action founded on the writ if that has once been properly issued. Moreover, the property which it now appears was possessed by the company was wholly insufficient to satisfy the plaintiffs' judgments, and therefore, under the statute, the writ was properly issued. (2)

Mellish, Q.C. (*F. M. White* with him), for the defendant. The question turns on the words of the 36th section of the Companies

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any person entitled to any such execution at all reasonable times to inspect the register of shareholders without fee."

Section 37. "If by means of any such execution any shareholder shall have paid any sum of money beyond the amount then due from him in respect of calls, he shall forthwith be reimbursed such additional sum by the directors out of the funds of the company."

(1) 11 East, 297.

(2) Three other points were discussed in this case—First, whether the property in certain iron rails had passed to the Devon and Somerset Railway company; secondly, whether the returns to the writs of fi. fa. had been made before the issuing of the writ of scire facias; and thirdly, whether the defendant had ceased to be a shareholder before the writ of sci. fa. was issued. They were all decided in the plaintiffs' favour, and as they involved only questions of fact, all reference to them is omitted both from the arguments and judgments.

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Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), "if there cannot be found sufficient whereon to levy." These words imply that you must first levy upon all the goods of the company as far as you can; if it were not so, why does the statute make it essential that execution should have actually issued against the company?

[KEATING, J. Would this point in any case be an answer to more than 150*l.*?]

Yes; because if the writ is issued at all, it must be issued for the whole amount remaining due on the judgment.

[BOVILL, C.J. The statute seems to contemplate the company having some property, because s. 37 provides that the shareholders shall be reimbursed in certain circumstances out of the funds of the company. There is no hardship in the case, because execution can only issue for the amount unpaid on the defendant's shares, and that is really the property of the company, and liable, like the rest of the property of the company, to the claims of creditors.]

The legislature have made a distinction by providing that execution shall first issue against the property of the company. And if the plaintiffs' be the true construction, even if the company had property worth 9000*l.* or 10,000*l.*, writs might be issued against the shareholders without that property being taken in execution, which seems contrary to the decisions.

[KEATING, J. There is a discretion in the Court whether it will allow the writ to issue, and the point has been raised in other cases on the question whether the writ should issue, not whether, if issued, it would be invalid as having been issued without authority.]

There are no decisions directly in point. In *Addison* v. *Tate* (1) and *Reg.* v. *Derbyshire, &c. Railway Company* (2), the writs of elegit had been executed as far as they could be, and the property was wholly insufficient to satisfy the debts. In the other cases on the subject, *Hitchins* v. *Kilkenny, &c. Railway Company* (3), *Devereux* v. *Kilkenny &c. Railway Company* (4), *Nixon* v. *Green* (5), and the

(1) 11 Ex. 250; 24 L. J. (Ex.) 249.

(2) 3 E. & B. 784; 23 L. J. (Q.B.) 333. *1st Jan 1857*

(3) 10 C. B. 160; 20 L. J. (C.P.) 31; 15 C. B. 459.

(4) 5 Ex. 834; 20 L. J. (Ex.) 37.

(5) 11 Ex. 550; 25 L. J. (Ex.) 209; in error, 3 H. & N. 695; 27 L. J. (Ex.) 509.

recent case of *Rigby* v. *Dublin Trunk Connecting Railway Company* (1), there was no property within the jurisdiction, and no property therefore which could be taken in execution under the judgment against the company. In *Nixon* v. *Green* (2) the question was raised at what time the shareholder becomes fixed with the liability, and it was held to be on the return of nulla bona being made by the sheriff; but no such return can properly be made if there be any goods of the company. The shareholders, therefore, are not liable where there is property of the company which has not been taken in execution by the creditor, and that is the case here.

J. Bridge, in reply, was not heard.

BOVILL, C.J. The question turns on the construction of the 36th section of the Companies Clauses Consolidation Act, 1845. It is contended that the plaintiffs have no right to execution against the defendant, because there is some property of the company of which he is a shareholder which has not been seized or sold. It is admitted, however, that the property is of small amount and not sufficient to satisfy the plaintiffs' debt. Now the plain grammatical meaning of the words of the section is, that if the property of a company be not sufficient to satisfy his debt, a creditor may issue execution against the shareholders, and I think that is the true meaning of the section, and that in order to give the Court jurisdiction it is enough that the property of the company is insufficient to satisfy the creditor's debt. I by no means say that if the property of the company is considerable, the Court would or ought to allow the writ of scire facias to issue, but it is a matter for their discretion, to be exercised at the time of the issuing of the writ, and is not a matter that can be pleaded afterwards. In most cases there is some property of the company, such as their office furniture, but usually not enough to be worth taking in execution; in some cases, however, there might be a large amount of property though not sufficient to satisfy the creditor's debt, and the Court would in such a case probably see if that could not be applied in reduction of the debt before allowing the writ to issue. There are several cases

(1) Law Rep. 2 C. P. 586.

(2) 11 Ex. 550; 25 L. J. Ex.) 209. In error, 3 H & N. 695; 27 L. J. Ex. 509.

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in which the Court of Chancery has held its hand to see if property of large amount possessed by the company could not be made available before recourse was had to the shareholders. I see no injustice that can arise under this construction of the section, because execution can in no case issue for more than the amount unpaid on the shares held by the defendant.

WILLES, J. I am of the same opinion. I think the objection that the company is possessed of property of the value of 150*l.* is removed by the fact that there cannot be found *sufficient* whereon to levy execution, which I think must mean not sufficient substantially to satisfy the plaintiffs' debt so as to make this proceeding unnecessary. I know that it has been held a good plea to a declaration on a scire facias that the company was possessed of property sufficient to satisfy the plaintiffs' claim; but that may well be, because it is a condition precedent to the exercise of the jurisdiction of the Court that the property of the company should be insufficient for that purpose. If, however, the property is insufficient, it is a matter for the discretion of the Court whether or not the writ shall issue, and the existence of the property cannot therefore be relied on by way of plea, or as an answer to the right of the plaintiffs to have execution under the writ.

KEATING, J., concurred.

MONTAGUE SMITH, J. I am of the same opinion. The amount of the property is so small, that I am not sure that the maxim de minimis non curat lex does not apply; but however that may be, I think the fact that the company had some property affords no answer to the plaintiffs' claim for execution, for as I read the section jurisdiction is given to the Court to order the writ to issue whenever sufficient property of the company is not found whereon to levy execution; and the Court has power in the exercise of that jurisdiction, if there is property available to satisfy a considerable part of the demand, to say that the writ shall not issue. It is certainly more for the advantage both of the company and the shareholders, that this should be in the discretion of the Court, than that it should be pleadable to the writ. In many cases, for instance, it might be a great injury to the company for its office

furniture to be seized, and little or no relief to the shareholders, yet it would be in all cases necessary for it to be seized or sold in the first instance if the defendant's contention were correct.

Judgment for the plaintiffs.

Attorneys for plaintiffs: *Bircham & Co.*

Attorneys for defendant: *Randall & Angier, for Riccard & Son, Southmolton.*

NOSOTTI *v.* HUDSON.

Jan. 17.

Practice—Common Law Procedure Act, 1852 (15 *&* 16 *Vict. c.* 76), *s.* 101—*Enlargement of Time.*

By the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 101, it is provided that where any issue is joined in any cause the defendant may in the cases therein provided, give twenty days' notice to the plaintiff to bring the issue on to be tried at the sittings next after the expiration of the notice; and if the plaintiff neglects to proceed to trial in pursuance of such notice, the defendant may enter a suggestion and sign judgment for his costs, provided that the Court or a judge shall have power to extend the time for proceeding to trial with or without terms:—

Held, that under the above section the Court or a judge can, after the twenty days have already expired, extend the time for proceeding to trial.

THIS was an action for the non-repair of a house. Issue was joined, and the plaintiff having failed to bring the case on in due course for trial, the defendant gave to him twenty days' notice to try at the next sittings, in accordance with the provisions of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 101. (1)

(1) 15 & 16 Vict. c. 76, s. 101:—"Where any issue is or shall be joined in any cause, and the plaintiff has neglected, or shall neglect, to bring such issue on to be tried, that is to say, in town causes where issue has been or shall be joined in, or in the vacation before, any term; for instance, Hilary Term, and the plaintiff has neglected, or shall neglect, to bring the issue on to be tried during or before the following term and vacation; for instance, Easter Term and vacation; and in country causes where issue has been or shall be joined in, or in the vacation before, Hilary or Trinity Term, and the plaintiff has neglected, or shall neglect, to bring the issue on to be tried at or before the second assizes following such term, or if issue has been or shall be joined in, or in the vacation before, Easter or Michaelmas Term, then if the plaintiff has neglected, or shall neglect, to bring the issue on to be tried at or before the first assizes after such term, whether the plaintiff shall in the meantime have given notice of trial or not, the defendant may give

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The plaintiff failed to try at such sittings, but after they were passed took out a summons at chambers for leave to set down the case to be tried at the next succeeding sittings. Byles, J., having made an order accordingly,

Littler, for the defendant, moved for a rule to shew cause why the order should not be set aside, on the ground that the judge had no power to extend the time for proceeding to trial, after the twenty days had already expired. The question depends upon the meaning of the word "extend;" that which has ceased to exist cannot be extended.

[WILLES, J. It was decided thirty years ago that the Court could, under 3 & 4 Wm. 4, c. 42, s. 39, enlarge the time for making an award after the time had expired. (1)]

There the word used is "enlarge," not "extend." The only decision upon the words of this act is a decision of Martin, B., at chambers, *Horner* v. *Spenser*. (2) There, the objection having been taken, Martin, B., refused to extend the time. There has also been a decision on the 194th section of the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), viz., *Wishart* v. *Fowler* (3); but there also the words are different. *Lord Ward* v. *Lumley* (4) was with respect to the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 37.

[KEATING, J. In *Farthing* v. *Castles* (5), it was argued that the application to enlarge the time could not be made till after the twenty days had expired and a suggestion been entered by the defendant.]

BOVILL, C.J. I should be sorry to throw any doubt on this point. The same observations apply to the word "enlarge" as to the word "extend," and it has been expressly decided in respect to

twenty days' notice to the plaintiff to bring the issue on to be tried at the sittings or assizes, as the case may be, next after the expiration of the notice; and if the plaintiff afterwards neglects to give notice of trial for such sittings or assizes, or to proceed to trial in pursuance of the said notice given by the defendant, the defendant may suggest on the record that the plaintiff has failed to proceed to trial, although duly required so to do (which suggestion shall not be traversable, but only be subject to be set aside if untrue), and may sign judgment for his costs, provided that the Court or a judge shall have power to extend the time for proceeding to trial, with or without terms."

(1) See *Parbery* v. *Newnham*, 7 M. & W. 378.

(2) 1 F. & F. 412.

(3) 4 B. & S. 674; 33 L. J. (Q.B.) 125.

(4) 5 H. & N. 656; 29 L. J. (Ex.) 372.

(5) 22 L. J. (Q.B.) 167.

arbitrations, that the Court has power under the provisions of 3 & 4 Wm. 4, c. 42, s. 39, to enlarge the time for making an award after the time has expired. A decision of Martin, B., at chambers, has been relied on; but there a suggestion had been entered which entitled the defendant to judgment, and it is only stated in the report that the application ought to have been within the twenty days, and that may have been on account of the special circumstances of the case, which are not mentioned.

WILLES, J. I am of the same opinion. The judge, however, ought to exercise his discretion whether, under the circumstances, he will enlarge the time; and we do not, therefore, overrule the decision of Martin, B., who appears to have arrived at it in the exercise of his discretion under the circumstances of the case.

KEATING, and MONTAGUE SMITH, JJ., concurred.

Rule refused.

Attorney for defendant: *Scarth.*

CULVERHOUSE *v.* WICKENS.

CLARK, GARNISHEE.

Jan. 17.

Debtor and Creditor—Garnishee Order—Common Law Procedure Act, 1854 (17 & 18 *Vict. c.* 125), *s.* 65—*Payment into Court.*

Payment into court by a garnishee under a judge's order, is a payment within the meaning of the Common Law Procedure Act, 1854, s. 65, and discharges the garnishee: and the subsequent execution of a composition deed by the debtor will not prevent the creditor being entitled to the money so paid into court.

A. having signed judgment against B. (a solicitor), obtained a garnishee order against C. who owed B. a bill of costs; C. obtained further time for taxing the bill on payment into court of 25*l.* B. subsequently, and before the taxation was complete, executed a composition deed, and gave notice to C. not to pay the amount of the bill to A. The bill when taxed was found to exceed 25*l.*

On an application by C. for the repayment to him out of court of the 25*l.*:—

Held, that the payment into court was within the 65th section of the Common Law Procedure Act, 1854, and discharged C. as against B., and that A. was entitled to the 25*l.*

THIS was an application on the part of the garnishee, for a rule calling on the plaintiff to shew cause why two orders of Montague Smith, J. and Byles, J. should not be set aside, and why a sum of

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25*l.*, which had been paid into court under the latter, should not be paid out of court to the garnishee.

It appeared that the defendant was a solicitor, who had been concerned for the garnishee in certain chancery proceedings, and had delivered to him a bill of costs. The plaintiff having signed judgment against the defendant for 72*l.* 12*s.* 4*d.*, an order was made on the 7th of December, 1867, on his application, by Montague Smith, J., that the garnishee should pay to him the said bill of costs after the same had been taxed, within a fortnight, and that in default of payment execution might issue for the same. The garnishee being unable to complete the taxation within the specified time a further order was made on the 23rd of December, by Byles, J., that upon the garnishee paying into court, on or before the 30th of December, the sum of 25*l.*, he should have a fortnight's further time to get the bill of costs taxed and to pay the same.

The garnishee accordingly paid into court the sum of 25*l.* on the 30th of December. On the following day, a deed of arrangement which had been entered into by the defendant with his creditors, was duly registered under s. 192 of the Bankruptcy Act, 1861. By this deed his creditors covenanted to forbear all proceedings against the defendant till the 31st of December, 1868; and it was provided that the deed should be a bar, and pleadable in bar as a release to any action, suit, or proceeding, against the defendant, or to any attachment, sequestration, or execution against the defendant, his estate, or effects, and should be an absolute release of such action, suit, or proceeding, or of such attachment, sequestration, or execution. There was an express reservation in the deed, of the rights of creditors against collateral securities. The defendant gave notice of this deed to the garnishee, and required him to pay the bill of costs to him. The bill of costs when taxed, amounted to 27*l.* 10*s.*

Lumley Smith, in support of the application. Notice of the deed of arrangement having been given to the garnishee before actual payment to the plaintiff of his debt, it would appear from *Wood* v. *Dunn* (1), that he is not justified in paying the amount to him

(1) Law Rep. 2 Q. B. 73, 84.

without applying to have the garnishee order set aside. In that case, the Court of Exchequer Chamber held that, under the special circumstances, the payment to the judgment creditor protected the garnishee; but they expressly said in delivering judgment, "We think it is not necessary for us to decide that it would be safe for a garnishee having been served with an order to pay, and afterwards, and before payment, receiving notice of bankruptcy or a trust deed, after that to pay under the order without an immediate threat of execution and without taking any steps himself to get the order set aside or giving notice to the assignee, informing him that he should pay unless the assignee got the order set aside."

[BOVILL, C.J. In this case 25*l.* has been paid into court.]

The payment into court is not a payment to the creditor.

[BOVILL, C.J. But is it not a security within the meaning of the clause in the deed which reserves the rights of creditors against collateral securities?]

It was not paid in as a security to the plaintiff, but as a condition of obtaining further time for taxing the bill of costs. The case of *Murray* v. *Arnold* (1), seems to shew that it depends on the special circumstances of each case, whether a payment into court is equivalent to a payment to the creditor, so as to give him a title to the money.

[WILLES, J. It is clear, that if the garnishee pays the money into court under a garnishee order instead of disputing the debt, it is under s. 65 of the Common Law Procedure Act, 1854, equivalent to a payment to the judgment creditor, and it should seem to be the same if money is subsequently paid into court by the garnishee, by order of a judge.]

If that be so, the order of Byles, J. should have directed the garnishee to pay to the plaintiff the excess of the bill above 25*l.* and not the whole bill. In *Tilbury* v. *Brown* (2), an order to pay the money claimed to the plaintiff had been made, and it was held that nothing but actual payment would have protected the garnishee from his liability to the assignees of the defendant, and that such payment must have been before the bankruptcy: the effect of a deed of arrangement is the same as that of bankruptcy.

(1) 3 B. & S. 287; 32 L. J. (Q.B.) 11. (2) 30 L. J. (Q.B.) 46.

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BOVILL, C.J. With respect to the sum of 25*l.* that has been paid into court I see no reason for granting the rule. Under the 63rd section of the Common Law Procedure Act, 1854, the garnishee may pay into court the money he acknowledges to be due from him, and by the effect of that and the 65th section such a payment would undoubtedly discharge the garnishee. In this case the money was paid in under the order of a judge, but it was paid in as an acknowledgment of the debt, and I think the effect was the same as if it had been paid in in pursuance of the section above alluded to. I also think that the plaintiff has a lien on the money which has been paid into court, within the meaning of the 184th section of the Bankrupt Law Consolidation Act, 1849; and there is also a reservation in the composition deed of the rights of creditors against collateral securities, which would seem to apply to this case. On these grounds I think that there is no reason for the application. With respect to the residue of the bill of costs, the motion had better stand over, as the parties will probably wish to settle the case, and avoid the expense of a rule, the amount being so small.

WILLES, J. I am of the same opinion. *Murray* v. *Arnold* (1) is an authority to shew that the payment into court was in effect a payment to the plaintiff. In that case the money was paid into court as a condition of the defendant obtaining an order to examine witnesses abroad. In effect, therefore, the defendant paid the money into court as a payment to the plaintiff if he was entitled to the money he was suing for. I think it is unnecessary in supporting that decision to refer to the doctrine of lien. Wightman, J., referred in that case to *Ferrall* v. *Alexander* (2) as an authority to shew that money paid into court under 7 & 8 Geo. 4, c. 71, s. 2, to abide the event of the suit, is not payment to the creditor within the protection of 6 Geo. 4, c. 16, s. 82, but I do not see that any member of the court said anything with reference to the garnishee clauses of the Common Law Procedure Act, 1854. The 65th section of that act must refer, I think, to all payments by the garnishee into court, whether made under the 63rd section as an acknowledgment of the debt, or subse-

(1) 3 B. & S. 287; 32 L. J. (Q.B.) 11. (2) 1 Dowl. 132.

9 Jur. N.S. 461.

quently under a judge's order, to be held for the creditor if he proves his claim to be just. The latter is, in fact, a payment to him if his claim is just, because it is payment into court in trust for him. The only argument that could be urged against its being treated as a payment to the creditor is that the latter may not make out his claim to the amount. That argument has failed, in point of fact, in this instance; and such a case can seldom occur under the garnishee sections, because the creditor must have already obtained a judgment for the amount he claims. If the garnishee be not really indebted to the amount paid into court, he is not liable to the debtor any more than to the creditor, and no such case as the present could therefore occur. If there be any cases in which, after money has been paid into court by the garnishee, the creditor may prove not to be entitled to it, it must be treated as a conditional payment to the creditor, and liable to be discharged if it should so turn out, and the payment of money into court is subject to the equitable jurisdiction of the Court. No inconvenience therefore will arise from the money being dealt with by the Court as if, at the time it was paid into court, it had been paid for the creditor, and the justice of the case requires that it should be so.

KEATING and MONTAGUE SMITH, JJ., concurred.

Rule refused as to the sum of 25l.

Attorneys for garnishee: *Mason, Sturt, & Mason.*

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Jan. 27.

GARDEN *v.* BRUCE.

Banker's Cheque—Bill of Exchange—Statute of Limitations—Loan.

The plaintiff having agreed to lend the defendant a sum of money, gave him a cheque for the amount, which the defendant paid into his bankers, receiving credit for it. The cheque was not paid by the plaintiff's bankers till some days later. In an action for the money so lent:—

Held, that the Statute of Limitations only ran from the time of the payment of the cheque by the plaintiff's bankers.

Declaration for money lent, and on accounts stated.

Plea: the Statute of Limitations.

The case was tried at the sittings in Middlesex after Trinity Term, before Montague Smith, J., when it was proved that the plaintiff, having promised to lend the defendant 100*l.*, gave him cheques for the amount, the last cheque, on which alone any question arose, being given to the defendant on the 14th of June, 1861. The defendant paid the cheque into his bank on the following day (June 15), and received credit for it. The defendant, having omitted to indorse it, though made payable to his order, the cheque was returned to him for his signature, and was not presented to the plaintiff's bankers and paid by them till the 21st of June. The writ was issued by the plaintiff on the 21st of June, 1867. A verdict was entered for the defendant on the plea of the Statute of Limitations, with leave to the plaintiff to move to enter the verdict for 45*l.*, the amount of the last cheque, on the ground that the statute did not commence to run till the payment of the cheque by the plaintiff's bankers.

Tapping having obtained a rule pursuant to the leave reserved,

Henry James and *Philbrick* shewed cause. The cause of action arose when the cheque was given, or, at any rate, when it passed into the hands of third parties, the defendant's bankers, who were holders for value. A cheque is an inland bill of exchange, and giving a cheque has the same effect as giving money, unless it is subsequently dishonoured. In Byles on Bills, 8th ed. p. 23, it is said, "A cheque, unless dishonoured, is payment;" so in Chitty on Con-

tracts, 7th ed., p. 662, it is said "A cheque operates as payment until it has been presented and refused." In *Irving* v. *Veitch* (1), it was held that when a debtor draws a bill of exchange, and gives it for his debt, it operates as payment from the time it is given to the creditor, and not from the time when it is paid. *Turney* v. *Dodwell* (2); *Gowan* v. *Forster* (3); are similar cases.

[BOVILL, C.J. In each of those cases the giving of the bill of exchange was treated as an acknowledgment of the debt.]

In the judgments the giving of the negotiable instrument is said to have been part payment. In *Pearce* v. *Davis* (4), Patteson, J., says: "It" (a cheque) "operates as payment until it has been presented and refused; and even if payment of it be refused, the refusal must be proved to have taken place before action brought." Evidence that a bill of exchange has been given will support a plea of payment, and not of accord and satisfaction only. The cheque must, at any rate, have amounted to payment from the time it got into the hands of a third party for value, as the plaintiff was then liable to be sued on it.

[WILLES, J. That was as if the plaintiff had given defendant a promissory note, and told him to raise money on it. The six years must be six years on every day of which the plaintiff could have sued out a writ against the defendant.]

Suppose the converse case, that A. had promised to lend B. 50*l.*, and had given him a cheque for that amount, could B. sue A. for not having lent him the money?

Keane, Q.C., and *Tapping*, in support of the rule, were not called on.

BOVILL, C.J. I think this rule should be made absolute. The only question is whether the cheque should be treated as an advance from the time it was given to the defendant, and used by him, or only from the time it was paid by the plaintiff. I think it must be considered as an advance from the latter time only, and that the Statute of Limitations did not begin to run before the cheque was paid. I quite agree with all the cases that have

(1) 3 M. & W. 90.
(2) 3 E. & B. 136; 23 L. J. (Q. B.) 137.
(3) 3 B. & Ad. 507.
(4) 1 Mood. & Rob. 365.

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been cited, but in all of them the cheque has been treated as an acknowledgment of a pre-existing debt. Here the debt did not accrue till the payment of the cheque.

KEATING, J. I am of the same opinion. The question is, when could the plaintiff have first sued the defendant for money lent? And it seems to me that he could not have done so till he had lent the money, which was when the cheque was cashed on the 21st of June.

MONTAGUE SMITH, J. I think the loan was when the plaintiff's money passed into the hands of the defendant, and not when the cheque was given. Otherwise it follows that if an action had been brought by the plaintiff for money lent he would, according to the opinion of Patteson, J., have been able to recover the amount of the cheque, although the cheque might have been subsequently dishonoured.

BOVILL, C.J. My Brother Willes, who has been obliged to leave the Court, was of the same opinion.

Rule absolute.

Attorney for plaintiff: *Lewis Hand.*
Attorney for defendant: *G. E. Philbrick.*

BARKER AND ANOTHER *v.* JANSON. 1868

Marine Insurance—Valued Time Policy—Estimated Value—Mistake. Jan. 15.

The value of the ship insured, stated in a valued time policy, is, in the absence of fraud, conclusive between the parties, however largely in excess of the true value.

A ship was insured by a valued time policy, and its value stated in the policy was 8000*l.* At the time the policy was made, but unknown to the parties, the ship had been injured in a storm, so that the expense of the repairs would have exceeded its value when repaired. During the continuance of the risk the ship was totally lost. In an action against the underwriters:—

Held, that the policy attached, notwithstanding the previous injury to the ship, and that, there being no fraud, the value of the ship as stated in the policy was conclusive between the parties.

DECLARATION against an underwriter as for a total loss on a valued time policy of insurance on the ship, *Sir William Eyre*, by which the ship was insured from and after thirty days after arrival at Calcutta, for and during the space of three calendar months for 6000*l.*, the ship being valued at 8000*l.*

Pleas amongst others, denying the policy, the interest of the parties in whom interest was alleged in the declaration, and that the ship was lost during the continuance of the risk.

The case was tried before Montague Smith, J., at the sittings in London after Michaelmas Term, and the following facts were proved.

The plaintiffs were the owners of a ship, the *Sir William Eyre*, which sailed from England for New Zealand in 1862, and was at that time worth more than 8000*l.* At New Zealand it was driven on shore and greatly injured. There being no means of repairing it there, the ship, after some delay, sailed to Calcutta, and arrived there on the 5th of June, 1864. She was then examined, and it was found that the injuries she had received were such that the cost of repairs would exceed her value when repaired. The vessel had been insured for her full value for the voyage to New Zealand, and the plaintiffs thereupon gave notice of abandonment to the underwriters, but the delay at New Zealand having arisen from causes which the plaintiffs might have prevented, the notice of

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abandonment was held by this Court in *Potter* v. *Campbell* (1) too late, but the plaintiffs recovered 7000*l.* as for a partial loss. On the 14th of July, 1864, while the ship was at Calcutta, the plaintiffs, who were not aware of the accident, insured the vessel for 6000*l.*, by a valued time policy, the time of the policy being for three calendar months from and after thirty days after the vessel's arrival at Calcutta, and the value of the ship being stated in the policy to be 8000*l.* The defendant was one of the underwriters of the policy for 200*l.* During the continuance of the policy, and before any repairs had been executed, the ship was wholly destroyed by a storm. The jury found that the *Sir William Eyre* was a ship at the time of the storm, and a verdict was entered for the plaintiffs as for a total loss, with leave to the defendant to move to enter a nonsuit, or a verdict for the defendant on the grounds that the policy did not attach, the *Sir William Eyre* having, in effect, ceased to be a ship before its arrival at Calcutta, or to reduce the damages on the ground that the value stated in the policy, being enormously above its true value, could be re-opened.

Watkin Williams (*Cohen* with him) moved for a rule, pursuant to the leave reserved. After the finding of the jury it must be admitted that she was not a wreck at the time the policy attached, but was correctly described as a ship, but she was not worth repairing, and therefore, for all practical purposes, had ceased to exist as a ship. It was decided in *Adams* v. *Mackenzie* (2), that a constructive total loss is a total loss.

(1) This was an action on a previous policy of insurance on the same ship, which came before the Court as a special case, the question for the Court being whether notice of abandonment had been given in time. The injury to the ship was sustained at New Zealand, but there being no means of ascertaining the extent of the injury there, it was decided to take the ship to Calcutta for that purpose; she was, however, detained at New Zealand for several months for want of funds to pay penalties which had been incurred by breaches of the Passengers Act. On her arrival at Calcutta, it was ascertained that the expense of her repair would exceed her value when repaired, and the owners immediately gave notice of abandonment. The Court held that the delay at New Zealand having been occasioned by the fault of the master, who was the agent of the plaintiffs, was unreasonable, and that the notice of abandonment was therefore too late.

(2) 13 C. B. (N.S.) 442; 32 L. J. (C.P.) 92.

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[BOVILL, C.J. Here there was no constructive total loss, because notice of abandonment was not given in time.

WILLES, J. If a ship is so injured that it cannot sail without repairs, and cannot be taken to a port at which the necessary repairs can be executed, there is an actual total loss, for that has ceased to be a ship which never can be used for the purposes of a ship; but if it can be taken to a port and repaired though at an expense far exceeding its value, it has not ceased to be a ship, and unless there is a notice of abandonment there is not even a constructive total loss.]

The main question in this case is whether the defendant is bound by the valuation of the ship contained in the policy. There is authority for saying that if the whole of the goods named in the policy are not subjected to the risk, the underwriter is not concluded by the amount mentioned in the policy, and if the parties estimate the value in ignorance of the true state of the case they are not bound by such estimate.

[WILLES, J. Take the case of an ordinary voyage policy from New Zealand to Calcutta, and suppose that the vessel has been injured at New Zealand just short of the point which would admit of her being abandoned, but so that when she gets to Calcutta 9000*l.* will have to be expended on repairs, if she be destroyed on the voyage do you say that the underwriter is entitled to have 9000*l.* deducted from the amount at which the vessel is valued in the policy?]

The valuation ought not to stand if it does not carry out the intention of the parties. There is no case indeed in which the question of value has been re-opened, except on the ground of fraud, but several works of authority say it may be re-opened in the case of enormous over-valuation: Arnould on Marine Insurance, 3rd ed. p. 292; Benecke on the Principles of Indemnity, p. 142. In this case the plaintiffs have already recovered 7000*l.* on other policies, and if they recover the 6000*l.* they claim on this policy they will have made a large profit out of the destruction of their ship.

[WILLES, J. How is this case distinguishable from *Irving* v. *Manning*?] (1)

In that case the vessel was of the value stated in the policy at

(1) 1 H. L. C. 287.

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the commencement of the risk, though not at the time of the making of the policy, and the amount named as its value was therefore at one time at risk, here however it never was at risk at all.

BOVILL, C.J. The first question in this case we have already disposed of in the course of the argument. The second question would be one of considerable importance if it were still open for discussion. There is no doubt, however, now that the parties may use either an open or a valued policy. In this case both parties have agreed upon a time policy (in which there is no warranty of seaworthiness), and have further agreed that, whatever its condition may have been at the time the policy attached, they will treat the value of the vessel as of a certain amount: both parties acting in good faith are willing to be bound by that valuation. If such be the agreement of the parties, upon what principle would the Court be justified in setting it aside? An exorbitant valuation may be evidence of fraud, but when the transaction is bonâ fide, the valuation agreed upon is binding. I think, therefore, that there should be no rule.

WILLES, J. I am of the same opinion. The question comes to this, whether, where a valued time policy has been made upon a ship in distant parts without any express condition as to the state of repair of the vessel (it being settled that there is no implied warranty with respect to that), the underwriters are entitled to a deduction on its being shewn that it would have cost a large sum of money on repairs to make her a complete vessel. No authority has been cited for it, and I never heard of underwriters claiming such a deduction, nor can I see that it would be equitable, because it would be contrary to the contract. It is said that there was a mistake as to the state of the ship; but a mistake to entitle the parties to re-open a contract of valuation, must be such as would entitle the parties to proceed in equity for relief. It must have been a mistake of both parties in respect of something which was material to the contract. The truth is, that the underwriters entered into the contract without caring to know whether the ship was in repair or not. Then it is said that the defendant's view is supported by several works of authority. It cannot, however, fraud

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apart, make any difference that the vessel has been enormously over-valued, except in respect of the statute 19 Geo. 2, c. 37. Apart from statute, parties could make what wagers they liked with respect to vessels. That act forbids insurances by way of wager, but the law remains as it was before where the insured has an interest in the vessel, and there is no wager. The meaning of the authors referred to, therefore, must be that an enormous over-valuation is proof of either fraud or wagering. Here there was no wager, the insurance having been bonâ fide; and it having been settled by *Irving* v. *Manning* (1) that valued policies are valid, if there be no fraud or wagering, I think it would be wrong to raise any doubt in this case by granting a rule. The case of an ordinary policy on a vessel "at and from," in which there would be a warranty of seaworthiness in case she sailed, but the vessel being ~~distrained~~ before sailing, thousands of pounds which might be required to make the vessel fit for sea are not expended, must be a case that has often occurred, and the fact that no claim has been ever made by underwriters to deduct the expense of such repairs, shews the understanding that has existed on this subject in the mercantile world. In fine, as pointed out by Patteson, J., in *Irving* v. *Manning* (2), so long as underwriters are willing to adhere to the system of valued policies, they must, where there has been no fraud, pay the stipulated amount.

KEATING, J. I also think there should be no rule. Mr. Williams admits that there is no case to be found in which the valuation in such a case as the present has been re-opened in the absence of fraud. It seems very undesirable to establish any precedent for so doing.

MONTAGUE SMITH, J. I am of the same opinion. It has been found convenient that the value of the ship should be agreed on, and stated in the policy, in order to avoid such inquiries as that now brought before us. If we were to grant this rule, it would become a question of degree in each case whether the difference in value was sufficient to entitle the parties to re-open the valuation. A thousand things might lessen the value of a vessel between the

(1) 1 H. L. C. 287. (2) 1 H. L. C. at p. 307.

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time of a policy being made and the time of its attaching, such as natural decay, worms, or the ship becoming a drug in the market; and all the evils intended to be avoided by this kind of policy would arise again. The estimated value, if excessive, may often be evidence of fraud, or of an intention to make a wagering policy, but here it is admitted that there was no intention to value the vessel beyond what was reasonable and fair. I think there is no pretence, either, for saying that there was a mistake: it is a misuse of the term, for the intention was to avoid all questions as to what was the real value of the ship, and both parties were aware that it could not at the time be ascertained with certainty what that value was.

Rule refused.

Attorneys for defendant: *Waltons & Bubb.*

Jan. 25.

TREADWIN *v.* THE GREAT EASTERN RAILWAY COMPANY.

Carriers Act (11 *Geo.* 4 *&* 1 *Will.* 4, *c.* 68), *s.* 1—*Accessories.*

5 E. 90

A lace corporal in a gilt frame, covered with glass, being intended for an exhibition, was enclosed in a packing case, and sent, without any declaration under the Carriers Act, by the defendants' railway, and lost:—

Held, per Bovill, C.J., & Byles, J. (Willes, J. dubitante), that as a matter of fact the gilt frame was distinct from and not accessory to the lace, and the packing case accessory to both or to the frame only, and that the carrier therefore was not protected by the Carriers Act from liability as respected either the gilt frame or the packing case.

DECLARATION against the defendants, as common carriers, for the loss of certain goods—to wit, one box, one registered design, one frame, and a quantity of lace. The second count was in trover for the same goods.

Plea, amongst others, that the goods were within the 1st section of the Carriers Act, that their value was above 10*l.*, and that they were not declared. Issue thereon.

The case was tried before Byles, J., at the sittings in Middlesex, after Hilary Term, when it was proved that the plaintiff was a lace manufacturer, and had sent to an ecclesiastical art exhibition at Norwich a lace corporal, intended for use in celebrating the

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Holy Communion, and a registered design. The corporal was placed in a gilt frame covered with a glass for exhibition, in the manner of a picture, and the whole were placed in a packing case, and delivered to the defendants to be carried from Norwich to Exeter by the defendants. No declaration of the value of the article, in accordance with the provisions of the Carriers Act, was made by the plaintiff. The package was lost during its carriage by the defendants. The verdict was entered for the plaintiff for 1*l.* 17*s.* 6*d.*, being the value of the gilt frame (independently of the glass) and the packing case, with leave to the defendants to move to enter the verdict, on the ground that they were protected by the Carriers Act from all responsibility, or to reduce the damages by the value either of the packing-case or of the gilt frame.

Philbrick having obtained a rule pursuant to the leave reserved,

McKellar shewed cause. There is no case exactly in point. In *Wyld* v. *Pickford* (1) it was decided that the case in which certain maps were carried was accessory to them, and was protected, but that case was decided on the terms of a carrier's notice, and not on the Carriers Act; moreover, there the claim in the declaration was for one case containing maps, which in itself admitted that the case was accessory to the maps. In the present case there is a distinct claim for "one box" as a separate article. The 1st section of the Carriers Act (2), in terms, speaks only of

(1) 8 M. & W. 443.

(2) 11 Geo. 4, & 1 Will. 4, c. 68, s. 1, provides that "From and after the passing of this act no mail contractor, stage coach proprietor, or other common carrier by land for hire, shall be liable for the loss of, or injury to any article or articles, or property, of the descriptions following, that is to say:" inter alia, writings or lace, "or any of them contained in any parcel or package which shall have been delivered, either to be carried for hire or to accompany the person of any passenger in any mail or stage coach, or other public conveyance, when the value of such article or articles or property aforesaid, contained in such parcel or package, shall exceed the sum of 10*l.*, unless, at the time of the delivery thereof at the office, warehouse, or receiving house of such mail contractor, stage coach proprietor, or other common carrier, or his or their bookkeeper, coachman, or other servant, for the purpose of being carried, or accompanying the person of any passenger as aforesaid, the value and nature of such article or articles or property shall have been declared by the person or persons sending or delivering the same, and such increased charge as hereinafter mentioned, or an engagement to pay the same, be accepted by the person receiving such parcel or package."

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the contents of the package, and the value of the case should be paid into court under s. 10. But, at any rate, the gilt frame does not come within the Carriers Act, and the plaintiff therefore is entitled to recover in respect of it, and the packing case is accessory to the frame quite as much as to the lace, and therefore is not protected. In *Hinton* v. *Dibbin* (1), though it is not exactly an authority on this point, all the previous cases were cited.

[WILLES, J. That case was explained in *Butt* v. *Great Western Railway Company*. (2) The gist of the decisions is simply that gross negligence is not, but robbery by the carrier's servants is, a good replication to a plea of the Carriers Act, while gross negligence is, and robbery by his servants is not, a good replication to a plea setting up a carrier's notice.

BYLES, J. Is there any case in which a plaintiff has recovered for part of a package, the rest of which consisted of excepted articles?]

In *Miles* v. *Cattle* (3) the plaintiff recovered for the carpet bag and his clothes, and the point was not even raised.

Philbrick, in support of the rule. If the frame and packing case were accessory to the protected articles, they were equally protected. That was decided by *Wyld* v. *Pickford* (4), though the question arose in a somewhat different form. The frame in this case was really a part of the corporal as much as the rollers were of the maps in that case. If the value of the frame can be recovered here, the value of the hooks and eyes on the silk dresses ought to have been recovered in *Flowers* v. *South-Eastern Railway Company*. (5) Even if the frame is to be treated as separate, it comes itself under the head of glass.

[BYLES, J. The value of the glass in the frame was 1*s.* 6*d.*, and has been subtracted in the verdict from the value of the frame, which was 1*l.* 11*s.* 6*d.*; surely the glass was at any rate accessory to the frame, not the frame to the glass.]

Where protected articles are packed in a case for conveyance, the case cannot be treated as a separate article. If a portman-

(1) 2 Q. B. 646; 11 L. J. (Q.B.) 113.
(2) 11 C. B. 140; 20 L. J. (C.P.) 241.
(3) 6 Bing. 743.
(4) 8 M. & W. 443.
(5) W. N. 1867, p. 155.

teau full of wearing apparel and jewelry is lost, no doubt the whole package will not be protected on account of the presence of the jewels, but the value of the portmanteau and clothes can be recovered; that was tacitly admitted in *Bernstein* v. *Baxendale.* (1)

[BOVILL, C.J. What should you say of the packing-case, if the frame be considered as a separate article and not protected.]

It would then be a mixed question of fact and law. If the packing case were held in fact to be accessory to the frame, or to be accessory to the frame as well as the protected articles, its value would be recoverable, notwithstanding there were articles in the package which were protected by the Act. This appears to have been assumed: *Phelps* v. *London and North-Western Railway Company.* (2) If the packing case was really accessory to the protected articles only, then it would be itself protected. Here the object of the packing case was to convey the corporal, the plaintiff is therefore not entitled to recover anything for it. [He also referred to *Brunt* v. *Midland Railway Company.* (3)]

BOVILL, C.J. Two questions arise in this case: 1st, whether the plaintiff is entitled to recover the value of the gilt frame; and, 2ndly, whether he is entitled to recover the value of the packing case. With respect to the gilt frame, it is necessary to decide as a question of fact, whether it was a constituent part of the corporal; if it were, then a further question might arise whether it was a part within the meaning of the Carriers Act. In the view I take of the facts, however, this further question does not arise, for I think the frame was a separate article, sent for the purpose of the corporal being exhibited in it, and not to be treated merely as part of or accessory to the corporal; the corporal could have been easily sent and exhibited without such a frame, but the latter was useful both for preserving it from dirt and enabling it to be more easily seen. Nor do I think that the frame can be said to come within the Carriers Act as "glass," for the glass of it

(1) 6 C. B. (N. S.) 251; 28 L. J. (C.P.) 265. 5 Jun MS 1858

(2) 19 C. B. (N. S.) 321; 34 L. J. (C.P.) 259. 11 Jun MS 1865.

(3) 33 L. J. (Ex.) 187. 16 Jun MS 1864

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must be considered as accessory to the frame, and not the frame to the glass.

Then as to the packing case. If the whole of the articles contained in it had been within the act it would have been difficult, I think, to distinguish this case in principle from *Wyld* v. *Pickford.* (1) It has been ingeniously argued that the form of the declaration, which claims expressly the packing case as well as its contents, takes it out of the authority of that case. If it were necessary to decide that point much might be said on each side. It is not necessary, however, to do so, because, as I hold that the frame must be treated as a separate article, the packing case was used to convey both articles which were, and articles which were not, protected by the act; and if I were to treat the packing case as accessory to either, I should consider it as accessory to the frame, since it was that which decided the size and shape of the case. It seems to me, therefore, that the verdict must stand for the whole amount.

WILLES, J. I should not have arrived at the same conclusion, but as my Brother Byles agrees with my Lord, and the question is not of great importance, I shall not formally dissent. For first, as to the frame, I think the corporal was sent in the frame as a pattern or a sampler might be, and I should have thought, therefore, that the frame was not a separate article, but merely accessory to the lace. Take a common case in which the frame is the most valuable, as gold spectacles with pebble lenses; it would be strange if the carrier should be liable to pay for the lenses, though protected from liability as to the gold frame. It is, however, a question of fact whether either of them, and if so which, is to be treated as accessory to the other, and I should not dissent from my Lord and my Brother Byles on a question of fact.

Then as to the packing case, I am not at all satisfied that the plaintiff is entitled to recover. The packing case was sent to enclose the corporal; nothing would have been sent if the corporal had not gone. My impression is, looking at the act and at ss. 3, 5, 7, and 9 as throwing light on the construction of the 1st section, that it was intended by the legislature that the same

(1) 8 M. & W. 443.

construction should be put upon the act as was put in *Wyld* v. *Pickford* (1) upon the carrier's notice, and that a packing case is within the act if the principal thing which it contains is within the act.

BYLES, J. I agree with my Lord and my Brother Willes that this should be treated as a question of fact. The plaintiff claims compensation for the lace, the registered design, the glass (which are all within the act), and the gilt frame (not within the act), and a packing case which contained the whole. I think the gilt frame was a substantive article, and no part of the corporal; it was not necessary to the use of the corporal, and I do not think it was accessory to it.

As to the packing case it was used, therefore, for other things besides those which were protected by the act, namely, the frame, and its size and shape were mainly determined by the frame; the plaintiff, therefore, is entitled to recover its value. I think this decision is mainly on questions of fact which are not likely to again occur.

Rule discharged.

Attorney for plaintiff: *W. R. Philp.*

Attorney for defendants: *W. H. Shaw.*

FENWICK *v.* SCHMALZ. *Feb.* 12.

Ship and Shipping—Charterparty—Demurrage—"Accident."

The defendant agreed by charterparty to load the plaintiff's ship with coal, in regular and customary turn, "except in cases of riots, strikes, or any other accidents beyond his control" which might prevent or delay her loading. To an action for breach of the above covenant in the charterparty, the defendant pleaded that he was prevented loading the vessel by a snowstorm, which rendered it impossible to bring the cargo to the agreed place of shipment:—

Held, on demurrer, that a snowstorm was not an "accident" within the meaning of the exception, and that the plea was bad.

DECLARATION setting out a charterparty made by the plaintiff as the owner of the ship *Erromanga*, with the defendant, as agent of the freighters, by which it was agreed, inter alia, that the ship

(1) 8 M. & W. 443.

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should, with all convenient speed, sail and proceed to a safe landing place in South Dock, Sunderland, and there load from the defendant, in regular and customary turn (except in cases of riots, strikes, or any other accidents beyond their control, which might prevent or delay her loading) a full and complete cargo of coals, and that being so loaded she should proceed with all despatch to Venice, and deliver the same to the freighters, one working day to be allowed the said freighters, weather permitting, for unloading the cargo. Averment, that it was subsequently agreed between the parties, that the cargo should be loaded on board the ship within a reasonable time, on the terms of the charterparty, in the Tyne, where she then was, instead of at Sunderland, that all conditions had been fulfilled, and that the defendant had not been prevented loading the cargo within a reasonable time, by any of the accidents or matters excepted in the charterparty. Breach, that the defendant did not load the cargo within a reasonable time.

Third plea: That the defendant was prevented from loading the ship within a reasonable time by accidents beyond his control, which delayed the loading, viz., by the great inclemency of the weather, and by the snow being from natural causes, and without the defendant being able to prevent it, so deep on the ground as to render it impossible to bring the agreed cargo to the place of shipment.

Demurrer and joinder.

Manisty, Q.C. (*C. H. Anderson* with him), in support of the demurrer. The cause of delay alleged by the plea is not an accident within the meaning of the exception, for it is not ejusdem generis with riots and strikes. A snowstorm, moreover, happens in the natural course of events, and is not indeed an accident at all. It is not said that the storm was in any way unusual.

[WILLES, J. There is an express provision with respect to the weather in another part of the agreement; we may presume, therefore, the parties would have mentioned the weather here if they had intended that it should be included in the exception.]

Further, the exception does not apply to the agreement with respect to the loading at the Tyne, which is an absolute agreement to load on the terms of the charterparty, and it has been repeatedly held that delay caused by the weather preventing a cargo being brought down to the vessel, does not exonerate the charterer from his contract to load: *Randall* v. *Lynch* (1); *Barret* v. *Dutton* (2); *Kearon* v. *Pearson*. (3)

[He was stopped by the Court.]

Temple, Q.C. (*Wharton* with him), in support of the plea. The case turns on the meaning of the word accident. An accident is something which happens, occurs, takes place, whether ordinary or not. Moreover, if we may take into consideration the known facts of nature, to have such a snowstorm as would prevent coals being brought from the pit is exceptional, and its happening on the particular day when the vessel required to be loaded is therefore an accident. The fact that the weather is specially provided for in the covenant respecting the unloading, shews that the parties considered that the defendant ought not to be responsible for the results of bad weather.

[WILLES, J. I should have thought the words "other accidents" meant accidents ejusdem generis with riots and strikes, in which human instrumentality is concerned.]

Riots and strikes are not ejusdem generis with one another, and the general word, therefore, is not confined to matters ejusdem generis with either of them. In the case of *Reg.* v. *Payne* (4), where the words of the statute were "any mask, dress or other disguises, any letter or any other article or thing," it was held that a crowbar came within the words.

[WILLES, J. That case falls within the rule, that if the particular words exhaust a whole genus, the general word must refer to some larger genus.]

The exception clearly applies equally to the agreement as altered; the parties intended merely to alter the place of loading.

Manisty, Q.C., in reply. Every accident is a thing which occurs,

(1) 2 Camp. 352.
(2) 4 Camp. 333.
(3) 7 H. & N. 386; 31 L. J. (Ex.) 1.
(4) Law Rep. 1 C. C. 27.

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but every occurrence is not an accident. An accident means an occurrence out of the ordinary course.

WILLES, J. I am of opinion that the plaintiff is entitled to judgment. This was a contract to load in a reasonable time, "except in case of riots, strikes, or any other accidents" beyond the defendant's control, which might prevent or delay her loading. The vessel appears to have been in her turn to load, and the time went by during which we must assume she should have been loaded, if nothing had happened. It really comes, therefore, to this: the defendant is without defence unless the cause of his delay was within the exception. The defendant says that the cause of his delay was a fall of snow, which prevented his bringing the coal to the place of loading: the most favourable supposition for the defendant would be that the snow blocked up the railway, and it might be said that the defendant should have brought the coal down before, and that it did not, except through the defendant's own default, prevent his loading the plaintiff's vessel. Riots and strikes however, appear to be accidents which would affect the loading, by preventing the coals being brought from the pit, and we must therefore give the exception a wider interpretation. Was the snow-storm, however, "an accident beyond the control" of the defendant? No doubt it was beyond his control, but was it an accident? I think not, because an accident is not the same as an occurrence, but is something that happens out of the ordinary course of things. A fall of snow is one of the ordinary operations of nature, and is an incident rather than an accident; and, therefore, without going into the rule that general words are to be restricted to the same genus as the specific words which precede them, I think this natural occurrence did not come within the terms of the exception in the charter-party.

MONTAGUE SMITH, J. I am of the same opinion. I must try to reach the meaning of the parties through the words they have used. I do not think that they intended to include delay caused by bad weather within the exceptions. In popular language, a fall of snow is not an accident, and I see no reason to suppose that the parties intended to use the word accident in any other than its

popular sense. It does not appear either that anything that could be called an accident resulted from the snow.

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Judgment for the plaintiff.

Attorneys for plaintiff: *John & J. K. Wright, for W. A. Oliver, Sunderland.*

Attorneys for defendant: *Williamson, Hill, & Co., for Ingledew & Doggett, Newcastle-upon-Tyne.*

END OF HILARY TERM.

CASES

DETERMINED BY THE

COURT OF COMMON PLEAS,

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF COMMON PLEAS,

IN AND AFTER

EASTER TERM, XXXI VICTORIA.

1868
April 24.

MAUGHAN *v.* VINESBERG.

Bankruptcy—Discharge of Debtor out of Custody—Costs.

An order of discharge in bankruptcy does not protect from arrest for the costs of an action in which judgment has been signed after the bankruptcy, even if the debt recovered in the action has been proved for under the bankruptcy.

4 Q.B. 257
—266, 11,
—273.
4 C.L. 693.

ACTION on a bill of exchange. On the 18th of November, 1867, the defendant became bankrupt, and gave notice of it to the plaintiff, and the cause was tried the same day as undefended, and a verdict entered for the plaintiff for 25*l*., and on the 27th of November judgment was signed, and the costs taxed. The plaintiff subsequently proved under the bankruptcy the amount of the judgment debt, but not of the costs. On the 8th of February, 1868, the defendant obtained his certificate of discharge in bankruptcy, and on the 17th of February he was arrested at the instance of the plaintiff on a ca. sa., indorsed with the amount of the costs only.

Patchett moved, on behalf of the defendant, for a rule calling on

the plaintiff to shew cause why the defendant should not be released out of custody.

The right to release is founded on the 162nd section of the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), and the only question appears to be, whether the costs are a debt, claim, or demand proveable under the bankruptcy. The case of *Oxlade* v. *North Eastern Railway Company* (1) would seem to shew that the costs on a judgment for the defendant are not proveable, but that case turns on the special words of the statute with respect to the defendant's costs. The provision with respect to the plaintiff's costs is in the 181st section of the Bankruptcy Act, 1849 (12 & 13 Vict. c. 106).

[BOVILL, C.J. That applies only to cases in which judgment has been obtained before the bankruptcy.]

The costs are to be considered part of the judgment debt, and are merged in the principal debt; this appears from the very form of the judgment, and the defendant being relieved from the principal debt must be relieved from the costs also.

BOVILL, C.J. I am of opinion that there should be no rule. The order of discharge protects only from arrest for debts proveable under the bankruptcy, which these costs were not.

BYLES, J. The 181st section of the Bankruptcy Act, 1849 (12 & 13 Vict. c. 106), on which Mr. Patchett relies, is in terms against him. The construction of that section was argued at length in *Oxlade* v. *North Eastern Railway Company* (1), and our present decision is in accordance with that case.

KEATING, J., concurred.

Rule refused.

Attorney for defendant: *A. Watson.*

(1) 1 C. B. (N.S.) 454; 26 L. J. (C.P.) 129.

1868
May 8.

BELL *v.* AITKIN AND OTHERS.

Costs—Taxation—Attendance of the Country Attorney at a Trial in London.

Where on the trial of a cause in London, the country as well as the London attorney attends, the rule that the costs of the attendance of the country attorney will not be allowed on taxation is not inflexible, but the master should decide, in the exercise of his discretion, whether, under all the circumstances of the case, such attendance was necessary.

THIS was a rule to review the master's taxation. The action was for the infringement of a patent, and the cause of action arose at Stockport. The trial took place in London, and lasted several days, and a verdict was ultimately found for the defendants. The defendants' country attorney, who had been concerned in getting up the case, attended at the trial as well as the London attorney. On the taxation of the defendants' costs the master allowed the costs of the attendance of the London attorney, but not of the country attorney, considering himself bound by a general rule not to allow both, and not therefore entering at all into the circumstances of the present case.

Watkin Williams shewed cause. It used to be customary to allow such costs as these, but the rule to the contrary is now established, and the expenses of a trial in London will be otherwise often greatly increased.

[BOVILL, C.J. It was the plaintiff who laid the venue in London.]

Thesiger, in support of the rule, was not called on.

BOVILL, C.J. I think this rule should be made absolute. It is very important that the masters should watch these charges, and should not allow in ordinary cases fees for the attendance of two attorneys. But cases may arise in which it is necessary that the attorney who has had the conduct of the case from its commencement, and is acquainted with all the facts, should be present at the trial, and I think that the present was such a case. The master does not appear to have exercised his discretion in the matter, but to have considered himself bound by an inflexible rule

that costs such as those in question shall be disallowed. I think that the rule is not inflexible, and that, in this case, it is right that the master should take the facts into his consideration, and exercise his judgment upon them.

BYLES, J. I am of the same opinion. I think the rule which the master has followed is a very valuable one, but that it is not to be considered as binding the master in all cases, but that he may exercise his discretion whether, under the particular circumstances of the case, he should not depart from it.

KEATING and MONTAGUE SMITH, JJ., concurred.

Rule absolute.

May 23. *Thesiger* again applied for a rule to review the master's taxation, on the ground that the master still refused to allow these costs. The master stated that he had exercised his discretion when the matter was first before him, and that he did not understand that the Court had decided that he was to allow the costs, if in his discretion he thought they ought not to be allowed.

The Court (BOVILL, C.J., and MONTAGUE SMITH, J.,) said that they had intended their previous judgment to be an intimation that, in their opinion, the costs in question ought to be allowed under the circumstances of the case, and they suggested that if this was stated to the master it would render a rule unnecessary.

Attorneys for plaintiff: *Worthington & Plunkett.*
Attorneys for defendants: *Gregory & Co.*

1868

April 21.

LEETE *v.* HART.

False Imprisonment—Notice of Action—Larceny Act (24 & 25 *Vict. c.* 96), *s.* 113 *—Honest Belief.*

The defendant hearing at night a noise, and seeing a man at the back door of his house, believed that an attempt was being made to break into it, and, acting on that belief, and on his wife telling him that the plaintiff was the man, he gave the plaintiff, a respectable neighbour, who happened to be passing the front of the house at the time, into custody. In an action for this false imprisonment, the defendant pleaded not guilty by statute 24 & 25 Vict. c. 96, which by s. 113 requires, in actions for anything done in pursuance of the act, notice of action to be given:—

Held, that an *attempt* to break into a house not being an offence within the act, the defendant did not believe in a state of facts, which, if it had existed, would have afforded a justification under the act, and was, therefore, not entitled to notice.

Semble, that even an honest belief in a state of facts which, if true, would have afforded a justification, would not have been sufficient, unless the defendant had reasonable grounds for his belief.

Roberts v. *Orchard* (2 H. & C. 769; 33 L. J. (Ex.) 65), explained.

Action for false imprisonment.

Plea: Not guilty, by statute 24 & 25 Vict. c. 96, ss. 51, 103, 104, 113.

The case was tried before Byles, J., at the sittings in London, after Hilary Term, when the following facts were proved:—The defendant having been for some time impressed with the belief that his house was about to be robbed, heard one night noises at his back door, and looking out believed that he saw a man there. He ran up stairs to fetch a pistol, and his wife ran out to the gate of the front garden and screamed murder. The plaintiff, a gentleman living in the neighbourhood, happened to be walking along the road past the gate at the time; and the defendant, having followed his wife out, was told by her that the plaintiff was the man, upon which he gave the plaintiff at once into the custody of a policeman who had run up on hearing the cries. Before reaching the station-house, however, he found that he had made a mistake, and withdrew from the charge. A verdict was found for the plaintiff for 10*l.*, with leave to move to enter the verdict for the defendant, on the ground that no notice of action had been given

in accordance with the provisions of 24 & 25 Vict. c. 96, s. 113. The judgment of the Court of Common Pleas to be conclusive.

Foard, on behalf of the defendant, moved for a rule pursuant to the leave reserved. It is admitted that the plaintiff was really innocent; but the defendant did nothing but what he might reasonably have done after what his wife said. He reasonably believed in a state of facts which entitled him to give the plaintiff into custody, and that is sufficient, according to the authority of *Roberts* v. *Orchard* (1), although the facts may not have really existed.

[KEATING, J. That case says "honestly believed," not "reasonably believed," which is more in your favour.]

The same law is laid down in *Hermann* v. *Seneschal* (2); and in *Heath* v. *Brewer* (3), Erle, C.J. expressly approves of the mode in which the law is stated by Williams, J. in that case. *Read* v. *Coker* (4) is also an authority, that the defendant need not be acting strictly in the execution of the statute to entitle him to a notice of action. The decision in *Downing* v. *Capel* (5), turned on the words in s. 103, "found committing;" there was in that case no pursuit even, till several hours after the offence was supposed to have been committed.

[BOVILL, C.J. What offence did the defendant here believe to have been committed; he did not believe that any one had actually entered his house.]

No, but he believed that some one had attempted to do so.

[BOVILL, C.J. That is not an offence under the statute, but only at common law; it is only in the case of something done in pursuance of the act that the defendant is entitled to notice of action.]

BOVILL, C.J. I am of opinion that there should be no rule. The case of *Roberts* v. *Orchard* (1) did not introduce any new law with respect to notice of action; the point actually decided in that case was that the exception was bad, because it was not sufficient

(1) 2 H. & C. 769; 33 L. J. (Ex.) 65.

(2) 13 C. B. (N.S.) 392; 32 L. J. (C.P.) 43.

(3) 9 L. T. (N.S.) 653.

(4) 13 C. B. 850; 22 L. J. (C.P.) 201.

(5) Law Rep. 2 C. P. 461.

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that the defendant should have believed that the plaintiff had committed the offence, but he must have believed that the plaintiff had been *found committing* it, in order to be entitled to notice of action. So far as the rule of law as to the right question to be left to the jury with respect to notice of action is concerned, the Exchequer Chamber expressly adopt and confirm what had been laid down by Williams, J. in the case of *Hermann* v. *Seneschal.* (1) The right question to be left for the jury is stated by the Court of Exchequer Chamber in *Roberts* v. *Orchard* (2) to be, "Did the defendant honestly believe in the existence of those facts, which if they had existed, would have afforded a justification under the statute?" Now, what facts did the defendant honestly believe in this case, which would have justified his conduct? He did not believe that his house had been entered, and an attempt to enter it would not have been an offence within the statute. I think, therefore, that he was not entitled to notice of action.

BYLES, J. I am of the same opinion. I entirely concur in what has fallen from my Lord, but I wish to make a further observation on the case of *Roberts* v. *Orchard.* (3) In that case, Willes, J., after expressing his concurrence in what had been said by Williams, J., makes some further observations, and the last sentence of his judgment (4) is, "It is clear to my mind from the defendant's evidence in answer, that he was acting on mere suspicion." Therefore, mere suspicion will not do. What is the difference between suspicion and belief? Suspicion may rest on no grounds: belief rests upon some grounds. I doubt, therefore, whether that case at all alters the law, and I think it is still necessary that the defendant should have some reasonable grounds for his belief in order to be entitled to notice of action. I think this the more, as Williams, J., in his judgment, expressly says, that he intends his judgment to be in accordance with what was laid down by Erle, C.J., in *Hermann* v. *Seneschal* (1), and in that case, Erle, C.J.

(1) 13 C. B. (N. S.) 392; 32 L. J. (C.P.) 43.

(2) 2 H. & C. at p. 774; 33 L. J. (Ex.) at p. 67.

(3) 2 H. & C. 769; 33 L. J. (Ex.) 65.

(4) 2 H. & C. at p. 777.

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says (1): "The jury having found that the defendant did really believe that the plaintiff had passed him a counterfeit coin, and did honestly intend to put the law in force against him, . . . and *as I am clearly of opinion that the facts were sufficient to justify that conclusion,* I do not think the other part of the finding, viz., that the defendant had no reasonable ground for such his belief, entitles the plaintiff to retain his verdict."

KEATING, J. I am of the same opinion. We do not intend by our judgment to impeach the rule laid down in *Roberts* v. *Orchard* (2), but it cannot be supposed that the Court there meant that if a man merely dreamt of a certain state of facts, without any grounds for his impression, and acted on it, it would be sufficient. Some facts must exist which might give rise to an honest belief on his part that such a state of facts existed as would have justified his actions. Here I see no facts that could give rise to such a belief. There was no evidence that an offence had been committed, much less that any one had been found committing it.

MONTAGUE SMITH, J. I am of the same opinion. I think it is not enough that the defendant should have believed that he was acting according to law. I observe that in *Read* v. *Coker* (3), Jervis, C.J., says, "If the defendant bonâ fide believed he was acting in the assertion of a legal right he was justified by the law, although he did not know precisely what that law was;" perhaps that may be stated too generally and would appear to include this case, but the rule, without saying that it is quite accurate, subsequently laid down by Williams, J. in *Roberts* v. *Orchard* (2) is sufficient for the purpose of disposing of the present case. It is evident here that the defendant is not within that rule, for he did not believe at all in the existence of facts which, if they had existed, would have afforded a justification under the statute. I observe that Parke, B. in *Hughes* v. *Buckland* (4) points out that there must be such facts in the case, that the defendant could have believed from them that he was acting within the statute, and we held the same in

(1) 13 C. B. (N.S.) at p. 403; 32 L. J. (C.P.) at p. 46.

(2) 2 H. & C. 769; 33 L. J. (Ex.) 65.

(3) 13 C. B. 850, 862; 22 L. J. (C.P.) 201, 205.

(4) 15 M. & W. 346.

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Downing v. *Capel.* (1) Here I come to the conclusion that the defendant could not have believed his house to have been broken open on that night, the more so as he did not go into the box to state what his belief really was.

Rule refused.

Attorney for defendant: *Sydney.*

April 24.

SMITH *v.* LONDON AND SAINT KATHARINE DOCKS COMPANY.

Negligence—Duty of Dock Company to Persons doing business on board Ships in the Dock.

9 QBD 303
304
11 QBD 504
512-5

The defendants, a dock company, provided gangways from the shore to the ships lying in their dock, the gangways being made of materials belonging to the defendants and managed by their servants. The plaintiff went on board a ship in the dock at the invitation of one of the ship's officers and, while he was on board, the defendants' servants, for the purposes of the business of the dock, moved the gangway, so that it was, and to their knowledge, insecure. The plaintiff, in ignorance of its insecurity, returned along it to the shore, the gangway gave way, and he was injured:—

Held, that there was a duty on the defendants towards the plaintiff to keep the gangway reasonably safe, and that he was entitled to recover damages from them for the injuries he received.

DECLARATION, that the defendants were possessed of certain docks, used by them for the purpose of docking and accommodating ships or vessels, and carried on the business of dock-keepers, and in their business of dock-keepers received ships and vessels into the said docks for the purpose of loading and discharging cargoes, and of doing other things connected with the business of the said ships or vessels, and of the owners and cargoes thereof, and the said defendants in their said business provided proper accommodation for the said ships or vessels, and means of communication between the said ships or vessels and the shore for persons having business on board the said ships or vessels, and having occasion to pass between the said ships or vessels and the shore, for reward to the defendants, and the defendants in their said business had received into the said dock a certain ship called the *Murray*, and had provided certain means of communication between

(1) Law Rep. 2 C. P. 461.

the said ship and the shore, that is to say, by means of a gangway extending from a certain jetty of the defendants to a certain other ship, and of another gangway from the said other ship to the said ship called the *Murray*, and the defendants, by their servants, so negligently, carelessly, and improperly constructed the said gangways, and so negligently, carelessly, and improperly conducted themselves in managing and taking care of the said gangways, that by reason thereof the plaintiff, who was lawfully passing over the same in crossing from the said ship to the said jetty, in and about certain business on board the said ship, fell and was thrown from off one of the said gangways into the water, and was in great danger of his life, and swallowed a large quantity of the water, which was of a noxious and poisonous character, and by reason of the premises the plaintiff was much hurt, bruised, and injured, and his health has been greatly injured and weakened, and the plaintiff incurred great expense for surgical, medical, and other attendances.

Pleas: 1. Not guilty. 2. That the defendants did not provide accommodation for the ships or vessels received into their docks, and means of communication between the ships or vessels and the shore, nor had they provided means of communication between the ship *Murray* and the shore, as alleged. Issue thereon.

The case was tried before Byles, J., at the sittings in Middlesex after Trinity Term, when the following facts were proved:—The defendants are the owners of the London Docks, and afford accommodation to vessels, for which they receive a certain remuneration, and in order that there may be a means of access to the ships from the shore, they provide gangways from one ship to another, and from the nearest ship to the shore. These gangways are moved from time to time to allow the ships to pass, and are under the management of the defendants' servants, and formed out of boards and other materials belonging to the defendants. The plaintiff was an optician, and had gone on board a ship, the *Murray*, which was lying in the docks, at the request of one of her officers, to shew him some nautical instruments. The only mode of access to the *Murray* was by a gangway from the shore to another vessel, the *Pekina*, and a second gangway from that vessel to the *Murray*. While the plaintiff was on board the *Murray*, the gangway between the shore and the *Pekina* was moved by the defend-

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SMITH v. LONDON AND SAINT KATHARINE DOCKS CO.

ants' servants, to allow some other vessels to be moved, and the gangway was thereby, as the servants who moved it knew, rendered unsafe. The plaintiff having finished his business on board the *Murray*, and received several orders, was returning to the shore, when the gangway gave way and he fell into the water and was injured. The jury found that there was negligence on the part of the defendants, and that there was no contributory negligence on the part of the plaintiff, and a verdict was entered for the plaintiff for 65*l.*, with leave to move to enter it for the defendants on the ground that there was no duty on them towards the plaintiff in respect of the gangway.

Coleridge, Q.C., having obtained a rule pursuant to the leave reserved, and also in arrest of judgment, on the ground that the record disclosed no breach of duty to the plaintiff,

O'Malley, Q.C., and *G. Francis* shewed cause. The defendants receive payment from the ships coming to their docks for the accommodation afforded them, and part of that accommodation is the means of ingress and egress from the ships afforded by their gangways. If the defendants did not provide these gangways ships would not come to their docks, and they do in fact therefore receive payment from the shipowners for their gangways; the plaintiff went on board at the request of one of the officers of the ship, and in pursuance of the right which the ships had thus obtained. Moreover, the defendants had not simply permitted the plaintiff to go on the gangway, but they had placed the gangway there in a manner which amounted to an invitation to the plaintiff to go on it, in the same way that the leaving a door open may amount to an invitation to persons to enter. The defendants were bound therefore to see that there was nothing in the nature of a trap, that is to say, no danger which was known to them, and not known to or discernible by the plaintiff, and after the finding of the jury it must be assumed that the the insecurity of the gangway was of that kind. The case of *Indermaur* v. *Dames* (1) in this Court is a strong, and in error stronger (2), authority for the plaintiff, and in *Corby* v. *Hill* (3), the mere permission to the public by the

(1) Law Rep. 1 C. P. 274. 12 Jur. N.S. 432 (3) 4 C. B. (N.S.) 556; 27 L. J. (C.P.) 318. 4 Jur. N.S. 512
(2) Law Rep. 2 C. P. 311.

owners to use a private road as the means of access to a lunatic asylum, was held to throw upon them the duty of keeping the road free from any dangerous and concealed obstruction. All the cases are commented upon at length in *Sullivan* v. *Waters*. (1) The cases of *Bolch* v. *Smith* (2), and *Gautret* v. *Egerton* (3), which will be relied on for the defendants, are distinguishable; in the former the danger was visible to the plaintiff, and, moreover, the plaintiff took the dangerous path for his own convenience, and it was not in any way held out to him by the defendants as the right road for him to take; in the latter there was no act done by the defendants, but they only failed to prevent the plaintiff going on a dangerous bridge on their property, and yet the judgment was rested upon the ground that no duty was disclosed on the declaration, while it appears to have been thought by the Court that a declaration might have been framed on the facts, which would have been good, for leave was given to the plaintiff to amend. With respect to the motion in arrest of judgment in the present case, the declaration is very different from that in *Gautret* v. *Egerton*. (3) That declaration in effect stated only that the plaintiff was crossing a bridge on the defendants' property by their permission, and that they having allowed the bridge to be out of repair the plaintiff fell through and was injured; it did not shew anything in the nature of an invitation by the defendants to the plaintiff, nor that the plaintiff was on any business in which the defendants had any concern. In the present case the declaration discloses that it was part of the business of the defendants to provide means of access to the ships in the docks, and that the plaintiff was passing along the gangway on business which he had on board one of the ships; and it is also averred that the gangway had been erected by the defendants as the means of access to the ship, which would amount to an implied invitation to use it, within the authority of *Corby* v. *Hill*. (4)

Coleridge, Q.C., and *Murphy*, in support of the rule. The case of *Indermaur* v. *Dames* (5), is the very authority on which the defendants rely; the ground of the judgment there was that the

(1) 14 Ir. C. L. Rep. 460.

(2) 7 H. & N. 736; 31 L. J. (Ex.) 201.

(3) Law Rep. 2 C. P. 371.

(4) 4 C. B. (N.S.) 556; 27 L. J. (C.P.) 318.

(5) Law Rep. 1 C. P. 274; in error Law Rep. 2 C. P. 311.

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plaintiff was on the defendant's premises in the execution of a contract with him, which threw on the defendant the duty of fencing dangerous holes which were unknown to the plaintiff. Here there was no privity between the defendants and plaintiff, and though the ship's crew might have been entitled to expect that the gangway was safe if they had not been warned of any danger, the plaintiff had no such right, but was bound, if he chose to go upon the gangway, to take all the risk as to its state. The case of *Bolch* v. *Smith* (1) is in principle similar, the ground of that decision being that the plaintiff had gone into the danger merely of his own will. The plaintiff had no *right* to go upon the gangway, but was only there by the permission of the defendants; they would have been perfectly justified in refusing to allow him to go on it.

[KEATING, J. I understand the plaintiff to contend that the defendants were bound to provide a means of access to the ship for all persons who had business to do on board, and not merely to provide means for the crew to go on shore.]

The plaintiff was not on board on the ship's business. If he had been arranging for the shipment of cargo, or had had any business of that kind, it might have been different. The case of *Corby* v. *Hill* (2), in which the liability of owners of land for accidents occurring on it is carried further than it is in any other case, is perfectly consistent with the defendants' contention. For whether the facts of the case really bore it out or not, it was assumed by the Court in that case that there was, on the part of the owners, an invitation to the plaintiff to go upon the road. Here there was nothing that amounted to an invitation to the plaintiff to go upon the gangway. The gangway was put there for the purpose of unloading the vessel, and was no invitation to any person except those who were so engaged. It is like the case of a shop, where the owner is bound not to suffer any concealed danger in the way of any person coming in to purchase goods, since he invites persons to do so, but he would be under no obligation towards a person who stepped into the shop to speak to a friend whom he saw in it. If the Court holds that the defendants were under the

(1) 7 H. & N. 736; 31 L. J. (Ex.) 201.

(2) 4 C. B. (N.S.) 556; 27 L. J. (C.P.) 318.

duty of warning the plaintiff, the defendants will have to keep men about the docks to inform every one who may happen to come into the docks whether the gangways are safe. The plaintiff was not obliged to use the gangway to reach the ship; he might have gone on board in a boat. If a person who went into a house fell over something in the hall, would the owner of the house be responsible?

[BYLES, J. It is more like the case of a concealed danger in the doorstep. The knocker says, "Come and knock me;" the bell says, "Come and ring me;" and a person going on the step to do so is injured. Would not the owner be liable?]

The declaration, at any rate, is insufficient. It is not enough that it states that there was a duty on the defendants; it must state the facts from which that duty arose. It does not allege any contract with the defendants, nor does it state that there was anything in the nature of a trap.

[BYLES, J. It states that the defendants had contracted with the owners of the ship to supply means of access for reward.]

That is only a contract with third parties, and will not affect the plaintiff's rights.

BOVILL, C.J. The first question is whether there was any evidence of a duty on the part of the defendants towards the plaintiff sufficient to support the verdict. I think that there was. The company are the owners of docks, and they undertook to, and did, provide not only berths and dock accommodation, but access by means of gangways to the vessel. The access would be, according to the usual course, not only for the purpose of loading and unloading, but for the use of all persons having lawful occasion to go on board upon the business of the ship, or of persons on board the ship. The gangways so provided by the defendants were constructed by their servants, on their ground, of their materials, and were maintained by them. They therefore would be responsible for them. No other access was provided by the defendants; and though it is said that persons might have gone on board by boats, there is no evidence that there was a boat there.

The case then stands thus: A gangway was provided by the defendants as the only access to the vessel. The defendants were

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aware that it was dangerous, but the plaintiff was not. The plaintiff comes to the spot, finds the gangway there, proceeds upon it, and falls into the water. The jury have found that there was negligence on the part of the defendants, and none on the part of the plaintiff. The defendants contend that they were under no duty to the plaintiff, because he had no business with the defendants themselves, and that they are not therefore answerable to him for any negligence in their mode of keeping the gangways. But since the defendants carry on the business of a dock company, and that business consists partly in providing access to the ships in the docks, it seems to me that the use of the access provided by them is as much business with the defendants as placing a ship in the docks would be, and they are, in truth, paid for it, not necessarily by every person who goes there, but by the owners of the ships on behalf of all who use it. It is not one person in ten who goes on board a ship in a dock for the purpose of transacting business in which the dock company are interested, in any other sense than that he goes upon the business of the vessel or of those on board, and it would seem strange if persons who may be obliged to go on board the ship, as, for example, the baker or butcher who supplies the ship, could receive no compensation for injuries received through the negligence of the company's servants. But, moreover, the gangway being provided by the defendants, and paid for by the shipowner, and being for the use of all persons having business on board the ship, and the only access to it, it seems to me that it amounts to an invitation to all persons having business on board the ship to go upon it. It has been contended that if the defendants are under any liability to the plaintiff, they must be equally so to every one who comes into the docks for the mere purpose of hawking goods; but to that I cannot agree. If a person who enters the docks be a mere volunteer, there may be no duty towards him on the part of the defendants; but if he has business on board the ship, then it seems to me the case assumes a different aspect, even independently of the fact that he will be then coming upon the business of the dock company in the sense I have described; for the gangway being placed there as the means of access to all persons having business on board the ship, it amounts to an invitation to persons having business on board the ship to go

upon it, as was held with respect to the road in *Corby* v. *Hill*. (1) The case then comes within the principle that persons inviting others on to their premises are answerable for anything in the nature of a trap. On these grounds I think that there was a duty upon the defendants towards the plaintiff.

Then it is contended that the judgment must be arrested, on the ground that the duty does not sufficiently appear on the declaration. In considering this we must remember that we are dealing with the declaration after verdict, and not on demurrer, and we must conclude therefore that the declaration has been expounded to the jury, and understood by them in the sense which will support it if there is any ambiguity. Looked at in this way, I think the averments contained in it are sufficient. If there were any reasonable doubt on the subject, we should, of course, amend the declaration, as was done in *Indermaur* v. *Dames* (2), but I think that is unnecessary. I am of opinion, therefore, that on both points the rule should be discharged.

BYLES, J. I am of the same opinion. This ship had certain rights against the defendants under the contract by which it entered the docks. Thus, persons going out of the ship, whether passengers or crew, would have a right to safe egress, and I think that the same rule would apply to all persons coming to the vessel upon any lawful business. Now, the vessel was several feet off from the shore, and above the level of the quay, and there was no other means of access to it than by this gangway. The gangway was under the control of the defendants alone, and the materials of which it was made were theirs, and at the time of the accident it was being arranged by the defendants' servants. The plaintiff had gone on board the ship by the invitation of one of the ship's officers, not as a mere guest, but on business, and he had actually done business on board the ship. I think, therefore, that there was a duty, on the part of the defendants to the plaintiff, not to permit the gangway to be insecure without warning the plaintiff of it.

With respect to the second part of the rule, after very carefully

(1) 4 C. B. (N.S.) 556; 27 L. J. (C.P.) 318. 4 Jur (N.S.) 572.
(2) Law Rep. 1 C. P. 274. 12 Jur (N.S.) 432.

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scanning the declaration, I think it sufficiently states the above facts, and that it is, therefore, not necessary to amend it.

KEATING, J. I have entertained great doubts on both points. I have had doubts whether the evidence shewed any duty on the part of the defendants to the plaintiff, and I have also had my doubts whether the declaration discloses that duty if it exists even with the intendments which should be made after verdict. I cannot say that my doubts have been altogether removed, and I shall only say that I do not feel sufficiently strongly to dissent formally from the judgments of my Lord and my Brother Byles, and I therefore concur.

Rule discharged.

Attorney for plaintiff: *B. F. French.*
Attorney for defendants: *Hacon.*

April 30.

COOKE, ASSIGNEE OF READ, A BANKRUPT, *v.* HEMMING.

Bankrupt; Reputed Ownership under 12 & 13 *Vict. c.* 106, *s.* 125—*Debt or Chose in Action.*

R. contracted to supply meat to a lunatic asylum; but, being unable to carry out the contract, assigned it to H., who delivered his own meat, but in R.'s name, the governing body of the asylum having no notice of the assignment, and not being aware that the contract was not being performed by R. The contract having been put an end to by notice from the committee of visitors of the asylum, and R. having become bankrupt, the assignee under the bankruptcy claimed the sum then due for meat supplied as being "goods and chattels" in the possession, order, or disposition of R. at the time of his bankruptcy, as reputed owner, with the consent and permission of H., the true owner, within the 125th section of the Bankrupt Act, 1849, 12 & 13 Vict. c. 106:—

Held, by Bovill, C.J., Byles and Keating, JJ., that the debt in question was within the order and disposition clause, and passed to the assignee; but that the latter could not avail himself of his right thereto without an order from the Court of Bankruptcy to sell,—a permission to sue for the debt not being sufficient for that purpose.

Held, by Willes, J., that, the meat never having been in R.'s possession, the debt which resulted from the supply to the asylum (though apparently by R.) was not a debt in his possession, order, or disposition at the time of his bankruptcy, with the consent of the true owner.

THIS was an issue directed by a judge's order, pursuant to the 1 & 2 Wm. 4, c. 45, and the 23 & 24 Vict. c. 126, s. 12, to try

whether the plaintiff, as assignee of James Read, a bankrupt, was entitled to a sum of 624*l.* 14*s.* lately held by C. Wright, the clerk to the committee of visitors of the Middlesex county lunatic asylum, and paid into Court.

The issue was tried before Byles, J., at the sittings in London after Hilary Term, 1867. The facts were as follows:—

On the 23rd of March, 1866, Read (the bankrupt) entered into a contract with the committee of visitors of the county lunatic asylum at Hanwell, for the supply of meat to the asylum for six calendar months from the 1st of April then next, at certain specified prices; the contract being determinable on three days notice, if the major part of the committee present at a meeting duly held by them should by their vote declare that the same had been broken or not performed; payment to be made one month after the expiration of each quarter. The defendant was one of the sureties for the due performance of the contract.

On the 1st of April, Read assigned the contract to Hemming, and the latter supplied meat to the asylum down to the 4th of May, each parcel being accompanied by a printed ticket on which was the weight of each description of meat, and on some of them the words "From C. F. Hemming, shipping butcher, 12, St. George's Street, East." No further supply took place, the committee of visitors having by notice to Read put an end to the contract. The committee had no notice or knowledge (other than that which the tickets would convey to them) that Read had assigned the contract, or that the meat had not been supplied by him.

Read became bankrupt on the 28th of April, 1866, upon his own petition. On the 11th of May, the committee of visitors received from Mr. Sorrell, the defendant's then attorney, a letter to the following effect:—"It seems that as Mr. Read was unable to carry out the contract, Mr. Hemming, as one of the sureties, performed it until it was determined by your notice of the 5th instant, and he therefore claims the amount now due from the asylum for the meat supplied thereunder, the particulars of which have already been furnished; and you will be pleased not to pay the amount to any other person than Mr. Hemming." The committee, however, declined to recognize Mr. Hemming as their creditor. On the 29th of May, the committee were served by Hemming with a formal

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notice that the contract had been assigned to him, and that all the meat supplied under it had been supplied by him, and demanding payment of the sum due on account of such supply.

The plaintiff, as Read's assignee, on the 24th of July, 1866, obtained the leave of the Court of Bankruptcy to bring an action against the clerk to the visiting committee of the asylum, and also an order under the 125th section of the Bankrupt Act, 1849 (12 & 13 Vict. c. 106), which latter, however, was not drawn up until after the trial.

An action having been commenced against Wright, as clerk to the committee of visitors, at the suit of Cooke, the former took out a summons to shew cause why a feigned issue should not be directed; and upon the hearing Montague Smith, J., made an order, that, after payment of Wright's costs (which were taxed at 19*l.* 12*s.* 10*d.*), the balance in his hands (624*l.* 14*s.*) should be paid into Court to abide the result of an issue, in which Cooke was to be plaintiff and Hemming defendant.

It was contended on the part of the plaintiff that the debt in question was a chose in action in the possession, order, or disposition of Read, at the time of his bankruptcy, with the consent of the defendant, the true owner, and consequently passed to Read's assignee. On the other hand, it was insisted for the defendant, that no debt was ever due from the committee of visitors of the asylum to Read, inasmuch as no goods had in fact been supplied by him; and that the order of the commissioner enabling the plaintiff to sue was not a sufficient order within the 125th section of the Bankrupt Act, 1849.

A verdict was entered for the defendant, leave being reserved to the plaintiff to move to enter the verdict for him, the Court to be at liberty to draw inferences of fact.

G. Denman, Q.C., in Easter Term, 1867, accordingly obtained a rule nisi to enter a verdict for the plaintiff for the price of the goods supplied down to the bankruptcy of Read, on the ground that the right to the price of such goods passed to the plaintiff, as assignee, by the operation of the 125th section of the 12 & 13 Vict. c. 106.

Robinson, Serjt., and *Pearce*, in Michaelmas Term last, shewed

cause. It may be conceded that a debt or chose in action comes within the definition of "goods and chattels" in the 125th section of the 12 & 13 Vict. c. 106. But the right which Read, the bankrupt, had under the contract with the committee of visitors of the asylum was not a debt, and consequently the assignment of the contract to Hemming was not an assignment of a chose in action, so as to require notice thereof to be given to the committee. It was, at the most, an assignment of a right to earn or create a debt as between Hemming and the committee. If it had become necessary to sue the committee for the goods supplied to them in performance of the contract, the action, it is true, must have been brought in Read's name as trustee; but there never was any point of time at which Read was owner or reputed owner either of the debt or of the goods the supply of which created the debt. Goods which are subject to a trust are not within the reputed-ownership clause: *Simmons* v. *Edwards.* (1) In *Broadbent* v. *Varley* (2), A. deposited with B. certain share certificates in a gas company, as security for a loan, and afterwards by deed assigned *all his personal estate* to C. and D., in trust for the benefit of his creditors. The assignees gave notice of the assignment to the company; but B. omitted to give notice of his equitable lien: and it was held that, notwithstanding the omission of such notice, C. and D. could not maintain trover against B. for the share certificates.

Denman, Q.C., and *Laxton*, in support of the rule. As between Read and Hemming, no doubt, the assignment made the debt Hemming's; but, by reason of the want of notice to the debtors, the debt remained in the order and disposition of the bankrupt at the time of his bankruptcy, with Hemming's consent. That a debt is within the description of "goods and chattels," in s. 125, is clear from *Ryall* v. *Rowles.* (3) In the notes to *Horn* v. *Baker* (4), the authorities are thus summed up:—"All *personal chattels* fall within this clause: ships,—*Stephens* v. *Sole* (5); *Atkinson* v. *Maling* (6); *Hay* v. *Fairburn* (7); *Monkhouse* v. *Hay* (8); unless, in the case of transfers by way of mortgage, such transfers

(1) 16 M. & W. 838.
(2) 12 C. B. (N.S.) 214.
(3) 1 Ves. Sen. 348; 1 Atk. 165.
(4) 2 Smith's L. C. (6th ed.) 190, 219.
(5) 1 Ves. Sen. at p. 352.
(6) 2 T. R. 462.
(7) 2 B. & A. 193.
(8) 2 B. & B. 114.

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have been registered before an act of bankruptcy, 17 & 18 Vict. c. 104, ss. 66, 75; furniture,—*Lingham* v. *Biggs* (1); utensils of trade,—*Lingard* v. *Messiter* (2), except perhaps when, as hinted in the principal case, there is a usage to demise them to the trader; stock,—*Ex parte Richardson* (3); bills,—*Hornblower* v. *Proud* (4); policies,—*Faulkner* v. *Case* (5); *Gale* v. *Lewis* (6); annuities,—*Ex parte Smyth* (7); freight of a ship,—*Leslie* v. *Guthrie* (8); bonds,—*Ryall* v. *Rowles* (9); promissory notes not negotiable,—*Belcher* v. *Campbell* (10); and other choses in action,—see *Dean* v. *James* (11); *Ex parte Monro* (12); *Belcher* v. *Bellamy* (13); shares in a company,—*Nelson* v. *London Assurance Company* (14); canal shares, if deemed personal property,—*Ex parte Lawrence* (15); *Ex parte Vallance* (16); and railway shares,—*Ex parte Harrison* (17); or shares in a newspaper,—*Longman* v. *Tripp* (18),—will all of them, if in the possession, order, or disposition of the bankrupt as reputed owner, with the consent of the true owner, at the time of his bankruptcy, pass to his assignees, by virtue of the 12 & 13 Vict. c. 106, s. 125." To these may be added *Bartlett* v. *Bartlett* (19), which was the case of an assignment by way of mortgage of a reversionary interest in stock; *Re Webb's Patent* (20), *Green* v. *Ingham* (21), and *Edwards* v. *Martin* (22), mortgages or deposits of life policies without notice; and *Gordon* v. *East India Company* (23), where A., a trader, and an officer in the East India Company's service, assigned his privilege of shipping goods from the East Indies to London to B. for a valuable consideration, and, in order to evade the bye-laws of the East India Company, which prohibited such assignments, the goods were shipped, entered,

(1) 1 B. & P. 82.
(2) 1 B. & C. 308.
(3) Buck, B. C. 480.
(4) 2 B. & A. 327.
(5) 1 Bro. C. C. 125.
(6) 9 Q. B. 730.
(7) 3 Mon. D. & De G. 687.
(8) 1 Bing. N. C. 697.
(9) Ves. Sen. 348; 1 Atk. 165.
(10) 8 Q. B. 1.
(11) 1 N. & M. 392.
(12) Buck, B.C. 300.
(13) 2 Exch. 303. Sed vide *Gibson* v. *Overbury*, 7 M. & W. 555.
(14) 2 Sim. & St. 292; and see *Ex parte Ord*, 1 Deac. 166.
(15) 1 De G. 269.
(16) 3 M. & Ayr. 224.
(17) 3 M. & Ayr. 506.
(18) 2 N. R. 67.
(19) 26 L. J. (Ch.) 577.
(20) 36 L. J. (Ch.) 341.
(21) Law Rep. 2 C. P. 525.
(22) Law Rep. 1 Eq. 121.
(23) 7 T. R. 228.

warehoused, and sold by the company in A.'s name, and the proceeds carried to his account, but before A. received those proceeds from the company he became a bankrupt; and it was held that his assignees were entitled to recover the amount in an action for money had and received against the East India Company who retained the same,—this being such a possession of "goods and chattels" in the bankrupt as fell within the 21 Jac. 1, c. 19, s. 11.

[WILLES, J. *Collins* v. *Forbes* (1), which is there cited, is more like the present case. There, the goods were in the possession of the bankrupt at the time of his bankruptcy, with the consent of the true owner, but for a special purpose, beyond which he had not the right of disposition or alteration; and it was held not to be a case within the 21 Jac. 1, c. 19.]

In *North* v. *Gurney* (2), A., having a contract with the Admiralty to deliver coals at certain foreign ports, at stipulated prices, shipped coals, in performance of the contract; and, in pursuance of the terms of the contract, deposited three parts of the bills of lading with the Admiralty, retaining a fourth part himself, which he deposited, together with the policies on the ships, with B., to secure an advance. The deposit was accompanied by a letter stating that it was made to secure the amount of the advance, and undertaking, in case of default in re-payment at maturity or on demand, to enable B. to receive the value of the cargoes. B., having given no notice to the Admiralty until after he, B., was aware of an act of bankruptcy by A., on which an adjudication was afterwards founded,—it was held that the moneys which became due from the Admiralty passed to the assignees, under s. 125 of the 12 & 13 Vict. c. 106. So far from the debtors in this case having any notice of the assignment of the contract, every effort was made by Hemming to conceal the fact from them. Assuming this to be a case within s. 125, there was nothing to shew that Hemming had done anything,—as Pollock, C.B., in *Belcher* v. *Bellamy* (3), seems to think ought to have been shewn,—to take this debt out of the order and disposition of Read.

[BYLES, J. If Hemming could not compel the committee to

(1) 3 T. R. 316. (2) 1 J. & H. 509.

(3) 2 Exch. 303.

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assent to his claim, how can the debt be said to have been in the order and disposition of Read with Hemming's consent ?]

In *Re Hughes's Trusts* (1), trustees were directed to raise out of real estate by sale, mortgage, or otherwise, 2000*l.*, for portions to be paid to younger children: before the portions were raised or payable, one of the younger children created an incumbrance on his share, of which notice was not given to the trustees until after his bankruptcy: and it was held that the interest of the bankrupt was not of the nature of realty, so as to exempt it from the doctrine of notice, and that the share passed to the assignees in bankruptcy, as in the order and disposition of the bankrupt.

The next question is, whether there was a sufficient order to vest the debt in the assignee, Cooke. Until the case of *Heslop* v. *Baker* (2), it had never been held that any order was necessary to vest in the assignees goods which were in the order and disposition of the bankrupt at the time of his bankruptcy. The 6 Geo. 4, c. 16, s. 72, enacted that, "if any bankrupt, at the time he becomes bankrupt, shall, by the consent and permission of the true owner thereof, have in his possession, order, or disposition any goods or chattels, whereof he was reputed owner, or whereof he had taken upon him the sale, alteration, or disposition as owner, *the commissioners shall have power to sell and dispose of the same for the benefit of the creditors under the commission.*" The 125th section of the 12 & 13 Vict. c. 106, substitutes for the words in italics "the Court shall have power to order the same to be sold and disposed of for the benefit of the creditors under the bankruptcy." The order is obtained upon an ex parte application,—*Ex parte Heslop* (3); *Ex parte Barlow* (4); *Quartermaine* v. *Bittleston* (5); and a mere general order will not do; it must specify the particular goods which are to be so sold: *Quartermaine* v. *Bittleston* (5); *Heslop* v. *Baker* (6); *Fielding* v. *Lee* (7); *Freshney* v. *Carrick.* (8) But an order to sell a "debt" could hardly be necessary. The 141st section vests all debts and choses of action of the bankrupt in his assignees, and s. 153 impowers the assignees, with the leave

(1) 2 H. & M. 89.
(2) 6 Exch. 740.
(3) 1 De G. M. & G. 477.
(4) 2 De G. M. & G. 921.
(5) 13 C. B. 133.
(6) 8 Exch. 411.
(7) 18 C. B. (N.S.) 499.
(8) 1 H. & N. 653.

of the Court, to sue for them. There is nothing in s. 153 to shew that the order need be in writing; and it may be retrospective.

Cur adv. vult.

The judgment of the majority of the Court (Bovill, C.J., Byles, J., and Keating, J.,) was now delivered by

BOVILL, C.J. This case was argued before my Brothers Willes, Byles, and Keating, and myself, and we all concur in the judgment which I am about to deliver, except my Brother Willes, who differs from us upon the principal question, and will deliver his judgment separately.

It was an interpleader issue, to determine the right to a sum of money which was owing by the committee of visitors of the Hanwell Lunatic Asylum. The amount was claimed by the plaintiff as the assignee in bankruptcy of James Read, the contractor with the committee, and by the defendant in the character of assignee of the contract from Read before his bankruptcy, and as having himself actually performed the contract on his own account.

The contract was entered into on the 23rd of March, 1866, for six months' supply of meat, commencing on the 1st of April; and payment was to be made within one month after the end of each three months of the term of the contract, subject to certain provisions as to penalties and other matters. Before any meat had been supplied under it, viz. on the 1st of April, this contract was assigned by Read, the bankrupt, to Hemming, the defendant, who had been one of his sureties. The whole of the meat delivered under the contract was provided and supplied by the defendant and at his sole expense; and there is no doubt that, as between Read and the defendant, the latter was entitled to the whole of the money that became payable under the contract.

No notice of the assignment to the defendant was given to the asylum up to the time of Read's bankruptcy on the 28th of April; and, notwithstanding certain delivery-notes and receipts were made out in the name of the defendant, the meat must, we think, be taken to have been supplied in the name and apparently on behalf of Read as the contractor with the asylum.

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Until after the bankruptcy, the committee of visitors and officers of the asylum had no notice or knowledge that the defendant or any other person except Read was entitled to the money which would become payable under the contract, or that Read was not entitled to receive it on his own account. There had been a further supply of meat by the defendant after the bankruptcy; but the claim in respect of that part of the supply was very properly given up by the assignee, leaving the sum in dispute 517*l.* 12*s.*; and, as to that amount, two questions only remain for our decision, and upon which the Court is to be at liberty to draw inferences of fact.

The first question is whether the present case comes within the reputed-ownership clause of the Bankrupt Act, 1849; and, if it does, then the second question arises, viz. whether there was a sufficient order for the sale and disposal of the property for the benefit of the creditors, within the meaning of the 125th section of the Bankrupt Act, 12 & 13 Vict. c. 106.

Upon the first question, it is to be observed that the money now claimed is in respect of the meat supplied in the manner before stated between the 2nd of April and the 28th of the same month, when Read became bankrupt; and it would not be payable under the terms of the contract until the 1st of August. The liability of the committee of visitors arises upon and by virtue of the contract, and not otherwise, and at the time of the bankruptcy no person other than Read appeared to the committee to be entitled to the benefit of the contract, or to receive or give a discharge for any money that was owing or might become payable under it.

Ever since the case of *Ryall* v. *Rowles* (1), in the time of Lord Hardwicke, it has been considered that debts and choses in action are goods and chattels, within the meaning of the provisions in the different bankrupt acts relating to reputed ownership; and that, in order to render an assignment or pledge of a debt or contract effectual as against assignees in bankruptcy, notice of the assignment or pledge must be given prior to the bankruptcy to the person who owes the debt, or who has to pay the money under the contract. The judgment of Lord Chief Baron Parker, in the case of *Ryall* v. *Rowles*, is as follows:—"On the third question, it

(1) 1 Ves. Sen. 348, 367; 1 Atk. 165.

is objected, for the defendant, that this clause (1) extends not to things in action, as are mortgages of parts of shares, speaking only of goods and chattels which a person has at the time of bankruptcy in his possession: but goods and chattels include debts: Stam. 188, a.; *Slade's Case* (2); and things in action are considered as goods and chattels in a person attainted, and so the Crown entitled: *Clayton's Case.* (3) So 12 Co. 1. If, then, goods and chattels comprehend things in action in the construction of any act of parliament, it ought in this; for, otherwise, he might assign without notice to others, and so have the order and disposition within the meaning of this clause: and this is enforced by the first clause, that the most beneficial construction for creditors under the commission should be made. But it is said there can be only an equitable assignment of a chose in action; which is true; and yet in case of bonds assigned (for, bills of exchange or promissory notes are assignable at law), they must be delivered, and such delivery of the bond, on notice of assignment, will be equivalent to the delivery of the goods; for, the debtor cannot afterwards justify payment to the assignor: Domat. Lib. 1, this clause extends to things in action; and all has not been done to divest the right from the bankrupt, and to vest a right in the mortgagee, for no notice appears to be given. The assignees, therefore, have power to dispose of it for the benefit of the creditors." A judicial interpretation was thus placed upon the words "goods and chattels;" and the same words having been used in the subsequent statutes, ought to receive, and as far as we are aware always have received, the same construction.

In the case of *Ex parte Monro* (4), where a bond had been assigned, and the bond itself delivered to the assignees, it was held that notice to the obligor was also necessary; and that, for want of such notice, the debt remained in the order and disposition of the bankrupt, the obligee, on the ground that there was nothing to take away his power to receive the money, and nothing to prevent a bonâ fide payment to him being a good payment, or to defeat a set-off of a debt due by him. The same doctrine has been applied in the case of money to become payable at a future

(1) 21 Jac. 1, c. 19, s. 11.
(2) 4 Co. 95 a.
(3) Litt. 86.
(4) Buck, 300.

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time upon policies of life-assurance; the most recent instances of which are *Webb's Policy*, before Malins, V.C. (1), and *Green* v. *Ingham* (2), in this Court. So, it has been decided that the assignment of the right to a share of personalty under a will, to which a bankrupt was entitled, required notice to the trustees, in order to prevent its passing to the assignees, as being within the order and disposition of the bankrupt: *Re Hughes's Trusts* (3): and, in like manner, it was held that notice is necessary in the case of an assignment of the right to a reversionary share of a fund in Court: *Bartlett* v. *Bartlett.* (4) In that case the late lamented Lord Justice Turner considered that the words "goods and chattels" comprise all the personal estate of the bankrupt of whatever nature or description. According to the report (5), his Lordship said:—"Upon the argument of this appeal, some doubt was suggested whether a contingent reversionary interest falls within the description of goods and chattels in the above-mentioned section of the act (6): but the words 'goods and chattels' are words of most extensive import. Unless controlled by the context, they comprise all the personal estate, of whatsoever nature or description. I see nothing in the context of this act to control them: and, looking at the general import of the words, and to what was said in the case of *Ryall* v. *Rowles* (7), I do not think—speaking with all respect to the contrary opinion said to have been expressed upon the subject in *Re Rawbone's Bequest* (8),—that any serious doubt can be entertained upon this point." And, with reference to the question of the consent of the true owner, in that case, the Lord Justice (9) says: "Looking at the question upon principle, what is the object of the enactment? Clearly, to prevent credit being obtained by an apparent ownership assumed with the consent and permission of the true owner. To confine the enactment to cases in which there is a visible ownership, would be to subvert decisions without end upon the subject; nor would it be consistent with the object of the enactment, for, credit may be got as readily upon property in which there is not, as upon property in which there is, a visible

(1) 36 L. J. (Ch.) 341. 2 Eq 456 (a)
(2) Law Rep. 2 C. P. 525.
(3) 2 H. & M. 89. 10 Jur NS 800
(4) 1 De G. & J. 12[illegible]. 3 Jur NS 705
(5) At p. 139. 3 Jur NS 706
(6) 12 & 13 Vict. c. 106, s. 125.
(7) 1 Ves. Sen. 348.
(8) 3 K. & J. 300. 3 Jur NS 837
(9) At p. 140. 3 Jur N S 706, 7

(a) 12 Jur NS 595.

ownership. Considering, then, the enactment to extend to personal chattels in which there is no visible ownership, when (to adopt the language of the statute) is a bankrupt to be said with the consent and permission of the true owner to have had in his possession, order, or disposition goods and chattels of this description, whereof he was the reputed owner, or whereof he has taken upon himself the sale, alteration, or disposition as owner? How is the true owner to prevent the reputed ownership? *How can it be prevented, otherwise than by notice to the person who is under liability in respect of the chattels?* The law has said this is the mode of preventing reputed ownership as to debts: and, is there to be one law as to debts and another as to legacies? The plain object of the statute is, that the true owner shall not permit the order and disposition to remain with the bankrupt; and, if he does not take the steps which are necessary to prevent it, surely he must be taken to permit it."

In *Gordon* v. *East India Company* (1), an officer of the company, contrary to their regulations, sold his privilege of shipping goods to a third person, who then shipped the goods on his own account, but in the name of the officer, who agreed to hold them on the shipper's account. No notice was given to the company that the goods were the property of the shipper: and, on the officer becoming bankrupt, it was held that the proceeds of the goods, which had been received by the company before the bankruptcy, passed to his assignees. It has also been assumed by very high authorities as clear law, and in accordance with what we believe to have been the general impression of the profession, that an assignment by a trader, before his bankruptcy, of freight to become due to him under a charterparty, required notice to the party from whom the bankrupt would be entitled to receive the money, in order to take it out of his order and disposition, within the meaning of the Bankrupt Act: see *Douglas* v. *Russell* (2) and *Gardner* v. *Lachlan*. (3) In the last case, Lord Cottenham, in his judgment (4), says: "When the doctrine was first entertained that debts due to a trader were within the 21 Jac. 1, c. 19, it became necessary to lay

(1) 7 T. R. 228.
(2) 4 Sim. 524.
(3) 6 Sim. 407; 8 Sim. 123; and on appeal, 4 My. & Cr. 129.
(4) 4 My. & Cr. at p. 131.

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down some rule by which such property might become capable of a secure assignment. It was considered that the debt whilst unpaid was in the order and disposition of the trader, inasmuch as he could demand payment of it when due, or direct payment to be made to any other person; and it was therefore held that notice authorized by the creditor to the debtor of the fact that the debt had been assigned to another, as it prevented it from thereafter being so in the order and disposition of the trader, would prevent the debt from being within the operation of the 21 Jac. 1. Such are the reasons upon which the rule is rested by Mr. Justice Burnet and Chief Baron Parker in the case of *Ryall* v. *Rowles*. (1) In *Jones* v. *Gibbons* (2), Sir W. Grant seems to doubt whether there was sufficient ground to require such notice, but supposes it to have been thought requisite, as otherwise the debtor might safely pay the money to the person who had without his knowledge ceased to be his creditor. That such notice to the debtor is necessary, cannot now be questioned; but the ground of the rule so established rests wholly upon this, that the party to whom notice is to be given is the party from whom the trader was to receive payment; in other words, the party holding the property at the order and disposition of the trader, and which order and disposition is for the future to cease in consequence of the notice."

The different bankrupt acts and the decisions upon them have all proceeded upon the principle of preventing a false appearance and reputation of means and credit in a trader, by which creditors might be misled and defrauded; and it is quite immaterial whether the property alleged to be in the order and disposition or reputed ownership of the bankrupt originally belonged to him or not. If the true owner allows the bankrupt to appear as the ostensible owner, or as having the order and disposition of it as reputed owner, the property may be claimed by the assignees under the bankruptcy.

The case of *Collins* v. *Forbes* (3) was much relied upon by the defendant; and it is quite true that in that case, where timber had been delivered by the defendant to the officers of the government in the name of the bankrupt, and as in performance of a

(1) 1 Ves. Sen. at pp. 364, 367. (2) 9 Ves. 407.
(3) 3 T. R. 316.

contract by him, it was held that it did not pass to the assignees. But the real ground of the decision was that the timber when delivered was under the control of the officers of the government, and that, the bankrupt having possession of it for a special purpose only, it was not in fact in his order and disposition. Mr. Justice Lawrence, in *Gordon* v. *East India Company* (1), explained that the decision proceeded upon this view of the facts; and, if so, it is no authority for the defendant in the present case.

It was also contended that the present case was similar in principle to that of a trustee or a factor: but, as between a bankrupt trustee and his cestui que trust, the trustee, and not the cestui que trust, has been considered to be the true owner; which cannot, we think, consistently with the authorities, be said of the bankrupt in this case, any more than it could be said of the bankrupt in the case of *Gordon* v. *East India Company.* (1) The case of a factor is also distinguishable, on the ground that by the usage of trade, and from the very nature of his employment, his possession of the property of other persons does not and ought not to create a reputation of ownership in himself. The same doctrine also applies to cases where there is a known practice of hiring articles and goods of any particular description. So, in the case of the purchaser of a business retaining the old name of the vendor, the assignees of the latter cannot claim the property unless the bankrupt had the possession of or some control over the property.

The case of *North* v. *Gurney* (2), before V.C. Page Wood is also a very strong authority in favour of the plaintiff. The bankrupt there, having a contract with the Admiralty for the supply of coals, and which were to be paid for on a future day, had delivered a portion of the coals, and deposited the bills of lading and policies of insurance with a third person as security for an advance, and as a further security wrote a letter amounting to an equitable assignment of the money that would become payable to him under the contract; but no notice of the security was given to the Admiralty until after notice of an act of bankruptcy: and it was held that the assignees were entitled to claim the amount, as having been in the order and disposition of the bankrupt with the consent of the true owner. It was there expressly decided that

(1) 7 T. R. 228. (2) 1 J. & H. 509.

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the interest to which the bankrupt was entitled under the contract, and the benefit of it, and the money which would become payable under it, were a chattel interest, and a chattel within the meaning of the Bankrupt Act; and that, the bankrupt having been allowed by the creditor who held the security to appear as the ostensible owner of the contract, and as the person entitled to receive and give a discharge for any money payable under it, or to deal with the contract by giving any fresh security upon it or otherwise, the chattel must be considered as being in the order and disposition of the bankrupt with the consent of the true owner, within the meaning of the Bankrupt Law, and passed to his assignees.

We are unable to distinguish the present case, in principle, from many of those which have been referred to, and especially the last case, of *North* v. *Gurney* (1), before V.C. Page Wood, in whose judgment we entirely concur: and we think the authorities are decisive that the debt in this case which was owing at the time of the bankruptcy of Read comes within the words "goods and chattels" in the statute; that, no notice having been given of the assignment, the debt must be considered to have been within the order and disposition of the bankrupt; and that this was with the consent of the true owner, viz. the defendant, Hemming. The bankrupt at the time of his bankruptcy was allowed by the defendant to appear as the person fulfilling the contract and entitled to the benefit of it and to receive the money that would become payable under it (subject to certain contingencies) from the committee of visitors. They would have been entitled to pay the bankrupt the amount without question or risk, or, if they had advanced money to him, would have been entitled to set off the amount. No notice of the assignment to the defendant was given to the committee of visitors until after the bankruptcy: and we are of opinion that the debt, though not payable at the time of the bankruptcy, and although it was subject to certain contingencies, would pass to the assignee, as having been in the order and disposition of Read, the bankrupt, as the reputed owner, at the time of his bankruptcy, with the consent of the defendant as the true owner, within the meaning of the bankrupt law.

(1) 1 J. & H. 509.

In the view which we take of this case, our judgment upon the first point would be sufficient to determine the right to the sum now in dispute, viz. 517*l.* 12*s.*, *substantially* in the plaintiff's favour: but, before the verdict on the issue can be entered for him for that amount, it must be shewn, secondly, that a proper order has been made by the Court of Bankruptcy to sell and dispose of the property for the benefit of the creditors, according to the act of parliament.

Now, that there was such an order *after the trial*, and before this motion was made, is not disputed. But the only order produced at the trial, and indeed that was in existence at that time, was, the usual order authorizing the plaintiff as the assignee to prosecute these proceedings; and such order alone can be relied on for the purpose of entering the verdict upon this motion. It was contended by the plaintiff that this order was in form sufficient within the meaning of the act of parliament, and of the authorities that were cited, viz. *Heslop* v. *Baker* (1); *Freshney* v. *Carrick* (2); *Fielding* v. *Lee* (3); *North* v. *Gurney*. (4) None of these cases, however, have gone the length of deciding that an order in this form would suffice. The present order may have been made upon grounds very different from those which ought to govern the making of an order for the sale of another person's property for the benefit of the bankrupt's creditors, within this section of the act of parliament: and in our opinion it is not in form or in substance a sufficient compliance with the statute.

The result of the whole case, according to our view, would thus be, that the defendant has established his right, by consent, to succeed in the issue as to that part of the debt which accrued *after* the bankruptcy; and that the plaintiff has substantially succeeded in establishing his right to the debt that was owing though not payable *before and at the time of the bankruptcy;* but that he cannot have the verdict entered for him in respect of this sum, for want of the proper statutable order having been obtained in sufficient time.

As that order, however, has since been obtained, we think that, unless the parties can come to some arrangement, there should be

(1) 8 Ex. 411.
(2) 1 H. & N. 653.
(3) 18 C. B. (N.S.) 499.
(4) 1 J. & H. 509.

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a new trial, if the plaintiff wishes it, on payment by him of the costs of the first trial and of this rule, within a month; otherwise, that the rule should be discharged: and a rule will be drawn up accordingly. If, however, the defendant should desire to take the opinion of a court of error upon the principal question, this might be done upon a special case, to be at once stated by consent, if the parties can agree; and the Court will be glad to give every facility for that purpose. (1)

WILLES, J. It is unnecessary for me to express any opinion as to the form of the notice; and it would be presumption to express an opinion upon that question, if the case should appear on consideration not to fall within the act of parliament, because there is no binding authority applicable to the case, and no sound reason has been adduced for doing that which, if the assignee succeed, it cannot be denied will be done, viz. to confiscate the proceeds of Hemming's goods to pay Read's creditors. But it should seem, upon consideration of the nature of the claim, that it is not within the Bankrupt Act, 1849, s. 125, and does not pass to the assignee by virtue of the general assignment clause (s. 141); and, speaking with sincere humility and deference to the opinions entertained by the majority of the Court, it does not appear to me to be touched by any of the decisions which were cited in the course of the argument, as the result of great labour and research. The difficulty, if any, arises from the special nature of the property in this case, especially with reference to whether regard is to be had to the debt which is the result of the supply of the goods, and that is to be treated as the subject to which the 125th section is to be applied, or whether the debt is not to be treated as the fruit of the beef and mutton supplied, and whether those goods are not to be dealt with as the subject to which the section is to apply or not. Now, the meat was supplied by Hemming to the lunatic asylum, not as the agent of Read, but as an independent tradesman. The goods so supplied by Hemming were not goods in respect of which he had any claim against Read, or in respect of which he could have proved against Read's estate, or in respect of which he was under

(1) By giving judgment at once pro formâ, upon a special case to be stated without pleadings.

any obligation by contract or otherwise to Read. The goods were never intrusted to Read. They were not goods which Read ever had in his possession, or which he could sell, alter, or dispose of; but they were goods which before they were delivered to the lunatic asylum were altogether in the possession, order, and disposition of Hemming, and after their delivery to the asylum were to be consumed by the inmates, and as to which, therefore, at no single period of time could it be said that Read had any control over them, or any power to interfere with them. The circumstance that Hemming had no right to claim against Read's estate seems to me to be of considerable importance; because the notion that a section in the act of parliament should be misapplied to such an extent as to take away Hemming's property without even giving him a claim against Read's estate, is in the result so inequitable that I cannot help thinking that we ought to be even painfully astute, consistently with a true interpretation of the law, to avoid arriving at such a conclusion. The next remark I would make is this, that the contract which was entered into between Read and the committee of visitors, and which was sold by Read to Hemming, did not create a debt. It would be an abuse of language to say that a debt was even inchoate thereby. At the time of the assignment to Hemming, it was a barren contract, or rather estimate. No debt could accrue from it unless goods were supplied under it. Consequently, in construing s. 125, and in determining whether the goods or the debt be the subject to which it is, in this case, to be applied, it is material to consider that, at the time of the assignment of the contract by Read to Hemming, there was no debt of any description; and this will become more material by-and-by, when the authorities come to be examined.

One circumstance ought not to be passed over, though it was properly a comment rather than an argument. It was asked, why did not Hemming give notice to the committee of visitors of the assignment of the contract to him? why let matters go on as if Read was still the person by whom the contract was being performed? The answer to that question is this, that, if the committee had been informed that the meat was not being supplied by the person with whom they contracted, they might have raised

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some difficulty; they probably would have declined to recognize a third party. No fraud is or could be suggested to have been practised upon the committee: but, even if there had been, it is difficult to see how that could help the case of the assignee. The burthen of shewing that he is entitled to the money paid into Court rests upon him. Perhaps, in the event of a new trial being had, it may be well for Hemming's advisers to consider whether at the time of the assignment the contract was one which could be enforced at law by Read against the committee of visitors.

It is well established that the assignees of a bankrupt, in order to make out their title, must shew a claim good both at law and in equity: it is not enough for them to shew the breach of a contract made with the bankrupt, if the beneficial interest is in a third person. But for the reputed-ownership clause, the assignee here would have had no claim. It has been held so often that the statutory execution gives no greater right to the assignees than the bankrupt had, except in so far as some express provision in the bankruptcy legislation gives them such right, that it is only necessary to say that assignees do not stand in the position of subsequent purchasers for value without notice, who first give notice to the debtor, and thus first get hold of the plank in the shipwreck. Notice is not necessary as against the assignees of a bankrupt, except so far as regards the clause as to reputed-ownership. This brings me to consider whether or not the reputed-ownership clause of the Bankrupt Act, 1849, applies to this case, in its spirit or in its letter.

First, with respect to the spirit of the law. The object of the section is obvious, that persons who have unconscientiously intrusted the bankrupt with personal property, goods and chattels, under circumstances in which a false credit might be acquired in respect of such intrusting, should upon the bankruptcy lose their right to the property, and that, a proper order being obtained from the Court of Bankruptcy, such property should be distributed as part of the bankrupt's estate. That contemplates that there are creditors who may be deceived, and contemplates a case in which false credit would be or might be acquired by the bankrupt. It is hardly necessary to say that that view in this case would be entirely false and erroneous; because, inasmuch as no

creditor of the bankrupt was called for the purpose of shewing that there was any reputed ownership in fact, or that any false credit was acquired, it may well be assumed that no creditor was in fact deceived or could have been deceived under the circumstances. And it may be very material, if the cause goes down to a new trial, to consider how far there may be in the trade of butchers, as was considered in the Exchequer to be notorious in the case of booksellers (1), an usage amongst them not to confine their dealings to their own goods only, but also to sell the goods of others on commission; in which case, if it be the custom in the trade of butchers, which one may well suppose it is, as in that of booksellers, it would be a question for the jury,—as was held in this Court in the case of the hiring of barges by coal-merchants (2), —whether creditors could be deceived or a false credit obtained by the bankrupt by reason of the omission to give notice of the assignment to the committee of visitors; and that is very material, as going to the merits of the question, because reputed ownership means reputed among those who would be likely to lend credit by reason of the assumed ownership, and who might therefore be misled. When you come to deal with knowledge of the debtor where no creditor has been deceived, you are dealing with a very artificial construction of the section, and one which ought not, I think, to be extended beyond what the authorities will warrant.

If, then, the case is not within the spirit of the enactment, is it within the letter? What is the letter of the enactment? Certainly not that in every case where a debt appears to have been incurred in the name of A., his assignees, upon his bankruptcy, shall become entitled to receive it, and the real creditor shall lose it. The letter of s. 125 is, that, if a person at the time he becomes bankrupt shall, by the consent and permission of the true owner thereof, have in his possession, order, or disposition any goods or chattels whereof he was reputed owner, or whereof he had taken upon himself the sale, alteration, or disposition as owner, the consequences are to follow which the assignee claims in this case. It is to be observed that there are three things, two of which must concur in order to bring a case within the letter of the enactment,—either

(1) *Whitfield* v. *Brand*, 16 M. & W. 282.

(2) *Watson* v. *Peache*, 1 Bing. N. C. 327.

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possession, order, or disposition as reputed owner, or possession order, or disposition, with the fact of the bankrupt having taken upon himself the sale, alteration, or disposition as owner. By reason of the use of the word "disposition" in both those combinations, it may be supposed that in the latter it was tautologous. So it is in the present statute. As it stood in the first statute which introduced the doctrine of reputed-ownership, the words were "order *and* disposition." But, whether by design or with a desire to improve the language, "or" has been substituted: and this is one of the occasions on which it may be immaterial whether the one expression or the other be used. There must be a reputed-ownership (which is out of the question here, as the authorities explain), or there must be proof that the bankrupt had taken upon himself the sale, alteration, or disposition of the property as owner, having control of the ownership or the quality. Has that been made out here? I apprehend not. Still bearing in mind the distinction between the goods and the proceeds of the goods, how stand the authorities?

With respect to goods which are in the hands of the bankrupt, if they are in his possession, order, or disposition, with one or other of the conditions referred to, the proceeds must follow the fate of the goods themselves. The case of *Gordon* v. *East India Company* (1) seems to me to be an indirect authority that, if this case is to be considered with reference to the goods as the principal subject, it is not within s. 125: and it is inconsistent with the previous case of *Collins* v. *Forbes* (2), which may be considered as overruled. In that case the East India Company had received the proceeds of goods which had been shipped in the name of the trader, which had been in his possession, and whereof he had, by his agents, the East India Company, taken upon himself the sale, and the sale as owner. There you have at once an illustration of the distinction upon which my present opinion is founded; for, that case, when properly understood, is an authority to shew that you are to look not to the proceeds but to the goods themselves, and see whether the goods represented by the proceeds have been in the possession, order, or disposition of the bankrupt with one or other of the conditions before referred to. No doubt, debts and choses in action in the

(1) 7 T. R. 228. (2) 3 T. R. 316.

nature of debts are within s. 125, where they are the proceeds of the bankrupt's labour or capital. But there is no one case from the beginning to the end of the series which has been referred to on the part of the plaintiff, in which money the proceeds of goods not supplied by the bankrupt or by any person as his agent, in respect of which he could not sue at the time of the assignment, which was not "inchoate," but was produced by something over which the bankrupt had no control, has been held to be a debt, or a chose in action in the nature of a debt, within s. 125. It is impossible to make this clear without going through some of the cases which have been cited. Take the case of freight. No doubt, freight which has begun to be earned by the bankrupt is within the section. So long ago as the time of Lord Ellenborough, it was held in the case of *Splidt* v. *Bowles* (1), that, if a ship were assigned in the course of a voyage, though the property in the ship would pass under the provisions of the Ship Registry Acts, yet the freight which was in course of being earned was subject to the operation of the reputed-ownership clause, and it was necessary to give notice. That was the case of a chose in action in the nature of a debt. The bankrupt had an inchoate interest in the thing which was the subject of litigation. But, would that reasoning apply to the case of a contract to carry by ship or ships, assigned before any ship of the assignor had tripped anchor, and to freight earned by the ships of the assignee? Then, take the case of the reversionary interest, before the Lords Justices,—*Bartlett* v. *Bartlett*. (2) That was the case of a right to receive something in futuro, with a present vested interest,—an ascertained subject-matter in respect of which credit might be obtained by the bankrupt. It was there urged in argument that "the policy of the act was to prevent traders from obtaining credit by a fictitious shew of wealth, and does not apply to property of which there is no visible and notorious ownership." But, what says that very learned and careful judge, the late Lord Justice Turner? "Looking upon the question upon principle," he says (3), "what is the object of the enactment? Clearly to prevent credit being obtained by an apparent ownership assumed with the consent and permission of the true owner. To confine the enactment to cases

(1) 10 East, 279. (2) 1 De G. & J. 127. 3 Jur N.S. 705.

(3) 1 De G. & J. at p. 140. 3 Jur N.S. 707

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in which there is a visible ownership, would be to subvert decisions without end upon the subject; nor would it be consistent with the object of the enactment, for credit may be got as readily upon property in which there is not, as upon property in which there is, a visible ownership." That is quite true. A man who possesses 1000*l* reversion in Consols may obtain more credit than he could if he had a flock of scabby sheep in his field. But, in this case, there was no "property," visible or invisible, at the time of the assignment. So, as to the policy of insurance (1), which is the strongest case that could be adduced in favour of the assignee, because the policy would fall to the ground but for the payments made by the assignee. There would seem to be no difficulty in holding a policy of insurance to be a chose in action in respect of which there must be a notice, to take the case out of the reputed-ownership clause, except in respect of the apparent equity created by the subsequent payment of premiums. In respect of that, there was an inchoate interest in the bankrupt at the time. That is a very strong case, no doubt; but it is not this case; it differs from it in a point to which attention has already been sufficiently drawn.

There is one other case which appears to me to be a strong authority against the assignee, as shewing, like *Gordon* v. *East India Company* (2), the extreme length to which the Courts have gone in applying s. 125, and yet falling short of this case. I refer to the case of *North* v. *Gurney* (3), before Vice-Chancellor Wood. There, a trader contracted to supply coals to the Admiralty, and, after himself supplying the coals, assigned the benefit of the contract, and became bankrupt. The case falls short of the present in its only distinguishing characteristic, and is clearly inapplicable.

In all these cases, the right to the debt in question had been inchoate in the bankrupt by reason of the expenditure of his labour or capital; and the debt would have been received by the assignee, if assignment in bankruptcy had come in the place of assignment to the creditor.

Now, what is there to be advanced by way of illustration upon the other side of the question? That which has been advanced over and over again by the advisers of assignees in bankruptcy,

(1) *Webb's Policy*, 36 L. J. (Ch.) 341. (2) 7 T. R. 228.
(3) 1 J. & H. 509.

but which never has been treated as giving rise to a claim, so far as the research of counsel and of my Lord and my learned Brothers enables us to judge. Take the case of the sale of a business. A. carries on business. Debts are due to him. The business is a valuable one, and it is desirable that it should continue to be carried on in the old name. B. buys the business, and carries it on for a long time under the original name, taking an assignment of the debts. With respect to the debts due or accruing due at the time of the transfer of the business, even though subject to a contingency, they would clearly be within s. 125 of the Bankrupt Act, 1849, and notice must be given by B. to the debtors, if he desires, in the event of A.'s bankruptcy, not to forfeit the value of his purchase. But suppose that, after B. has carried on the business for a series of years, introducing new capital, and extending his connexion, A. becomes bankrupt,—has it ever been suggested that in such a case debts arising out of the sale of B.'s goods, though sold in the name of A., are to be confiscated for the payment of A.'s creditors? Everybody would exclaim against the injustice of such an attempt. It seems to me that that would be the result of holding in this case that Read's assignee is entitled to the proceeds of the meat supplied by Hemming subsequently to the assignment of the contract to him. In the case I put of the sale of a business, the only way of preventing the application of the 125th section is, to say that the *goods* never were in the possession, order, or disposition of A., and that he never took upon himself the sale, alteration, or disposition thereof. And, as already shewn, reputed ownership will not do, unless coupled with the possession, order, or disposition as owner. The only sensible way of disposing of that is, to say that the mere fact of a debt being contracted in the name of A. will not bring the case within the reputed-ownership clause; but you must look to whether the goods were within the clause, not whether the debt was incurred so as to appear to have belonged to A. This also seems to be the only way in which it ever has been held, and as Lord Mansfield in one of the leading cases on this subject (1) seemed to think it clear it must be held, that goods in the possession of factors, as trustees (to use his Lordship's expression), are not within this clause, and not because of the custom only,

(1) *Mace* v. *Cadell*, Cowp. 232.

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in which there is a visible ownership, would be to subvert decisions without end upon the subject; nor would it be consistent with the object of the enactment, for credit may be got as readily upon property in which there is not, as upon property in which there is, a visible ownership." That is quite true. A man who possesses 1000*l* reversion in Consols may obtain more credit than he could if he had a flock of scabby sheep in his field. But, in this case, there was no "property," visible or invisible, at the time of the assignment. So, as to the policy of insurance (1), which is the strongest case that could be adduced in favour of the assignee, because the policy would fall to the ground but for the payments made by the assignee. There would seem to be no difficulty in holding a policy of insurance to be a chose in action in respect of which there must be a notice, to take the case out of the reputed-ownership clause, except in respect of the apparent equity created by the subsequent payment of premiums. In respect of that, there was an inchoate interest in the bankrupt at the time. That is a very strong case, no doubt; but it is not this case; it differs from it in a point to which attention has already been sufficiently drawn.

There is one other case which appears to me to be a strong authority against the assignee, as shewing, like *Gordon* v. *East India Company* (2), the extreme length to which the Courts have gone in applying s. 125, and yet falling short of this case. I refer to the case of *North* v. *Gurney* (3), before Vice-Chancellor Wood. There, a trader contracted to supply coals to the Admiralty, and, after himself supplying the coals, assigned the benefit of the contract, and became bankrupt. The case falls short of the present in its only distinguishing characteristic, and is clearly inapplicable.

In all these cases, the right to the debt in question had been inchoate in the bankrupt by reason of the expenditure of his labour or capital; and the debt would have been received by the assignee, if assignment in bankruptcy had come in the place of assignment to the creditor.

Now, what is there to be advanced by way of illustration upon the other side of the question? That which has been advanced over and over again by the advisers of assignees in bankruptcy,

(1) *Webb's Policy*, 36 L. J. (Ch.) 341 (4 (2) 7 T. R. 228.
(3) 1 J. & H. 509.

(4 de G. & J. 454; 12 Jur. N. S. 579.

but which never has been treated as giving rise to a claim, so far as the research of counsel and of my Lord and my learned Brothers enables us to judge. Take the case of the sale of a business. A. carries on business. Debts are due to him. The business is a valuable one, and it is desirable that it should continue to be carried on in the old name. B. buys the business, and carries it on for a long time under the original name, taking an assignment of the debts. With respect to the debts due or accruing due at the time of the transfer of the business, even though subject to a contingency, they would clearly be within s. 125 of the Bankrupt Act, 1849, and notice must be given by B. to the debtors, if he desires, in the event of A.'s bankruptcy, not to forfeit the value of his purchase. But suppose that, after B. has carried on the business for a series of years, introducing new capital, and extending his connexion, A. becomes bankrupt,—has it ever been suggested that in such a case debts arising out of the sale of B.'s goods, though sold in the name of A., are to be confiscated for the payment of A.'s creditors? Everybody would exclaim against the injustice of such an attempt. It seems to me that that would be the result of holding in this case that Read's assignee is entitled to the proceeds of the meat supplied by Hemming subsequently to the assignment of the contract to him. In the case I put of the sale of a business, the only way of preventing the application of the 125th section is, to say that the *goods* never were in the possession, order, or disposition of A., and that he never took upon himself the sale, alteration, or disposition thereof. And, as already shewn, reputed ownership will not do, unless coupled with the possession, order, or disposition as owner. The only sensible way of disposing of that is, to say that the mere fact of a debt being contracted in the name of A. will not bring the case within the reputed-ownership clause; but you must look to whether the goods were within the clause, not whether the debt was incurred so as to appear to have belonged to A. This also seems to be the only way in which it ever has been held, and as Lord Mansfield in one of the leading cases on this subject (1) seemed to think it clear it must be held, that goods in the possession of factors, as trustees (to use his Lordship's expression), are not within this clause, and not because of the custom only,

(1) *Mace* v. *Cadell*, Cowp. 232.

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4. Immediately on the execution of the deed, possession of all the property comprised therein of which the plaintiff could give or order possession was given to the trustee therein mentioned, and who had duly executed the deed.

5. On the 13th of October, 1865, all the requirements of s. 193 of the Bankruptcy Act, 1861, were duly published in the London Gazette.

6. On the 17th of October, 1865, the plaintiff obtained a certificate of registration and protection pursuant to the form provided by the Bankruptcy Rules, 1861, and which was good upon the face of it. [The certificate was set out.]

7. On the 13th of January, 1867, the defendant, without having first obtained the leave of the Court of Bankruptcy, issued a ca. sa. against the plaintiff.

8. The defendant subsequently, on the 31st of January, 1867, caused a writ exigi facias to be issued and lodged with the Sheriff of Middlesex, for the purpose of causing the plaintiff to be proclaimed in outlawry.

9. On the 6th of February, 1867, notice of the plaintiff's certificate of protection was served on the defendant's attorney.

10. On the 7th of February, 1867, a first proclamation was made in pursuance of the writ of exigi facias.

11. On the 7th of March, the plaintiff was proclaimed a second time; and on the 4th of April, 1867, a third proclamation was made, when the plaintiff presented himself and produced his certificate and claimed to be protected from arrest, but was nevertheless taken into custody, and was afterwards released on paying into Court the amount of the debt and costs and 5*l.* additional, amounting in the whole to 83*l.* 6*s.* 10*d.*, to abide the result of an application to the Court.

The question for the opinion of the Court was, what under the above circumstances was the effect of the certificate of the registrar in bankruptcy upon the defendant and also upon the sheriff.

If the Court should be of opinion that the effect of the certificate was to entitle the plaintiff to be discharged from custody, although the sheriff before he made the arrest was told by the defendant that the certificate was obtained by means of the registration of a deed which was invalid, the judgment was to be entered

up for the plaintiff for the amount of the money paid into Court, viz. 83*l.* 6*s.* 10*d.*, and the full costs of this suit and proceedings thereon. If the Court should be of opinion in the negative, then the full costs of the special case and proceedings thereon were to be paid to the defendant.

Robinson, Serjt. (*Tapping* with him), for the plaintiff. That the sheriff would have been justified in declining to arrest the plaintiff upon his producing the certificate of registration, notwithstanding the deed was a bad one, is clear from *Lloyd* v. *Harrison.* (1) The question here is whether he was not bound to discharge him, leaving the execution creditor to his remedy by application to the Court of Bankruptcy. That Court has power to allow execution to issue even though the deed be good, or to refuse to allow it though the deed be a bad one. (2) In *Norton* v. *Walker* (3), it was held that an officer was justified, under the 23rd section of the 5 & 6 Vict. c. 122, in discharging a person who had been adjudicated a bankrupt, and who produced a summons in bankruptcy, though in truth he was not a bankrupt, the words "such bankrupt," in that section, being taken by the Court to mean "the party so adjudged bankrupt." Pollock, C.B., in giving judgment in that case, says (4): "The real point is, what is the meaning of the words ('such bankrupt') in the passage in question? Do they apply exclusively to persons who really are bankrupts, *i.e.*, to traders who have committed an act of bankruptcy, and against whom a fiat has issued on a good petitioning-creditor's debt, and who have thereupon been duly declared bankrupt; or do the words comprise all persons against whom a fiat has issued, and who have been thereupon by the proper Court adjudged to be bankrupt? We are of opinion that the latter is the proper construction. The remedy provided is one which admits of no delay. The party arrested is to produce his summons, and the sheriff is *immediately* to discharge him. The sheriff could not possibly obey this enactment, if he were bound in the first instance at his peril to ascertain that his prisoner had been a trader, that he had committed an act

(1) 6 B. & S. 36; 34 L. J. (Q.B.) 97; in error, Law Rep. 1 Q. B. 502.

(2) See *Ex parte Morrison, In re Clunn*, 33 L. J. (Bkr.) 47.

(3) 3 Ex. 480; 18 L. J. (Ex.) 234.

(4) 3 Ex. at p. 489; 18 L. J. (Ex.) at p. 237.

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of bankruptcy, that a fiat had issued on a valid and sufficient debt, and that he had been adjudicated a bankrupt thereon." The same rule of construction must be applied to the words "such deed" in the 198th section of the 24 & 25 Vict. c. 134. The cases of *Dewhurst* v. *Kershaw* (1); *Ilderton* v. *Jewell* (2); and *Leigh* v. *Pendlebury* (3), which will be relied on as warranting the arrest, are all distinguishable; and, if not, they are overruled by *Lloyd* v. *Harrison*. (4) In the first of these cases the matter scarcely underwent any discussion; in the second, the argument turned mainly in the Court below, and entirely in the Court of error, upon the construction of the deed; and in the third it was assumed that if the deed was bad the arrest was good.

[BOVILL, C.J. These cases, I think, occurred before it had been decided that "the Court," in s. 198, meant the Court of Bankruptcy. (5)

MONTAGUE SMITH, J. Unless he is bound to discharge the party on production of the registrar's certificate, the sheriff might in all cases exercise his discretion, which would be putting the man entirely in his power. On the other hand, no very great hardship is imposed upon the creditor: he may go to the Court of Bankruptcy, and obtain an order to issue execution.]

Nasmith (*Junner* with him), for the defendant. The case of *Lloyd* v. *Harrison* (4) is relied upon by the plaintiff, but that only decides that a sheriff *may* release a debtor out of custody upon the production of a certificate of the registration of an invalid composition deed, which is not inconsistent with the previous cases of *Dewhurst* v. *Kershaw* (1); *Ilderton* v. *Jewell* (2); and *Leigh* v. *Pendlebury*. (3) These latter cases expressly decided that the certificate of registration of an invalid deed does not entitle the debtor to be discharged out of custody.

[MONTAGUE SMITH, J. Those cases were peculiar; the two first were applications to the Court to exercise an active interference

(1) 1 H. & C. 726; 32 L. J. (Ex.) 146.

(2) 14 C. B. (N.S.) 665; 32 L. J. (C.P.) 256; in error, 16 C.B. (N.S.) 142; 33 L. J. (C.P.) 148.

(3) 15 C. B. (N.S.) 815; 33 L. J. (C.P.) 172.

(4) 6 B. & S. 36; 34 L. J. (Q.B.) 97; in error, Law Rep. 1 Q. B. 502.

(5) See *Skelton* v. *Symonds*, 18 C. B. (N.S.) 418; 34 L. J. (C.P.) 151.

to release the debtor, and the Court declined to act, on the ground that the deed was invalid. The case of *Lloyd* v. *Harrison* (1) shewed that it was unnecessary to come to the Court to obtain the release of the debtor if the sheriff was willing to release him; and the question now comes before the Court for the first time, whether the debtor is entitled to be released by the sheriff without the interference of the Court.]

The case of *Sellin* v. *Price* (2) is a later case than *Harrison* v. *Lloyd* (3), and is contrary to it, if the latter really lays down that the sheriff is bound to release the debtor on the production of the certificate of registration of an invalid deed. There can be no doubt that the sheriff ought to refuse to release the debtor if the certificate is manifestly fraudulent upon its face, and the same must be the case if the fraud, though not manifest upon the face of the certificate, has been brought to the sheriff's knowledge.

Robinson, Serjt., in reply. The point was not raised or discussed at all in *Sellin* v. *Price*. (2)

BOVILL, C.J. The present case raises an important question on the 198th section of the Bankruptcy Act, 1861, which comes now distinctly before the Court for the first time, viz., whether the sheriff, on the production of a certificate of the filing and registration of a composition deed under the hand of the chief registrar and the seal of the court of bankruptcy, is bound by that section to release the debtor out of custody notwithstanding he has notice that the deed is invalid. It has been already decided by the Exchequer Chamber, in the case of *Lloyd* v. *Harrison* (1), that he is at liberty to do so if he thinks fit; and it would be strange if the words of the section bore one construction with respect to the sheriff, and another with respect to the debtor. There are, however, some earlier decisions, which seem to proceed on the ground that the debtor is not entitled to his release if the deed be bad, and on these Mr. Nasmith relies. When the question first arose, shortly after the passing of the act, there was great doubt as to the intention of the legislature. In *Dewhurst* v. *Kershaw* (4) application was made to the Court of Exchequer to discharge out

(1) 6 B. & S. 36; 34 L. J. (Q. B.) 97; in error, Law Rep. 1 Q. B. 502.

(2) Law Rep. 2 Ex. 189.

(3) Law Rep. 1 Q. B. 502.

(4) 1 H. & C. 726; 32 L. J. (Ex.) 146.

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of custody a debtor who had obtained a certificate of the registration of a composition deed, and this being in the nature of an appeal to the equitable jurisdiction of the Court, it was probably in the exercise of their discretion that they examined the deed, and refused to interfere when it was shewn to be invalid. Then in *Ilderton* v. *Jewell* (1) the question arose upon the demurrer to a plea, and the Court expressed a strong opinion that the certificate of the registration of an invalid deed could have no effect, though the judgment might, perhaps, be supported upon other grounds. This was succeeded by the case of *Leigh* v. *Pendlebury* (2), which was on a similar application to that in *Dewhurst* v. *Kershaw* (3), and in which the previous decisions were followed.

When the question came before the Court of Queen's Bench, in *Lloyd* v. *Harrison* (4), Cockburn, C.J., thought that the question was concluded by the three cases before mentioned, and on that ground differed from the other judges, who sought to distinguish them, and held that the sheriff was entitled to discharge the debtor. The case was taken to the Exchequer Chamber (5), and the three previous cases were again cited; but that Court, not being bound by them, upheld the decision of the Court of Queen's Bench without attempting to distinguish those cases, and must, I think, be taken to have overruled them. It is true that the question in that case was whether the sheriff was *justified* in releasing the debtor, but that depended upon the construction to be put upon the 198th section of the Bankruptcy Act, 1861. There can be no doubt that if the certificate of registration of an invalid deed is within the 198th section, it will entitle the debtor to his release as well as justify the sheriff in releasing him, since it is to have the effect of an order of protection in bankruptcy; and the Court held that, notwithstanding the use of the expression "*such* deed," the sheriff was justified in releasing the debtor, although the deed was invalid. The word "such" cannot, therefore, have the effect which has been contended for to-day of confining the section to valid deeds,

(1) 14 C. B. (N.S.) 665; 32 L. J. (C.P.) 256; in error, 16 C. B. (N.S.) 142; 33 L. J. (C.P.) 148.

(2) 15 C. B. (N.S.) 815; 33 L. J. (C.P.) 172.

(3) 1 H. & C. 726; 32 L. J. (Ex.) 146.

(4) 6 B. & S. 26; 34 L. J. (Q.B.) 97.

(5) Law Rep. 1 Q. B. 502.

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but the certificate of registration of an invalid deed will protect the debtor as an invalid order in bankruptcy would. It was, no doubt, in the contemplation of the Court that their decision involved the *right* of the debtor to be released, and Erle, C.J., in delivering the judgment of the Court, says: "The protection given to the debtor is not a mere privilege, but a right to be at once discharged, as in the case of a protection in bankruptcy."

I have no doubt, after reading the whole judgment, with what view those words were used, and that they are a distinct expression of opinion by Erle, C.J., of the right of the debtor to be released. If we were to hold otherwise, it would be in the discretion of the sheriff whether he would release the debtor or not, which might lead to much oppression and wrong. No hardship to the creditor is involved, because by the very same section power is given to the court of bankruptcy to grant leave to the creditor to issue execution notwithstanding the certificate. In the case of bankruptcy the protection order clearly entitles the debtor to release until the bankruptcy has been set aside, and the certificate of the chief registrar, though not quite so formal, is a declaration by the proper authority of the debtor's right to be released, which is in force until it has been set aside. I think, therefore, that this rule should be made absolute.

BYLES, J. I am of the same opinion. It is unnecessary to follow my Lord through all the authorities he has referred to. It is sufficient to say that I concur in the substance of his observations upon them. I have had this question repeatedly before me at Chambers, and after the best consideration that I have been able to bestow on the subject, it seems to me that we give due effect to the words "such deed" in the 198th section, by saying that it means such a deed as the court of bankruptcy (which has jurisdiction over the matter) has by filing and registration pronounced to be primâ facie a good deed. The certificate to that effect is to be available, not for all times or all purposes, but for the ad interim protection of the debtor from process against his person, till the protection shall be revoked, or the deed declared void by a court of competent jurisdiction. The case of *Skelton* v. *Symonds* (1)

(1) 18 C. B. (N.S.) 418; 34 L. J. (C.P.) 151.

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shews that at this period of the proceedings the court of bankruptcy is the court to consider the circumstances, and to pronounce on the personal status of the debtor or quasi bankrupt. Still, the creditor is not left without remedy. He may apply to the court of bankruptcy for leave to issue execution or to set aside the certificate, or he may bring an action in a superior court to try the validity of the deed. That being so, the construction we now put on the 198th section protects the bankrupt and the sheriff, and yet saves the ultimate rights of all persons. If it were otherwise, a sheriff or a judge at chambers, in every case of execution against the person of a quasi bankrupt, might have to enter into the consideration of the bankrupt's circumstances, and of the sums due to every one of the bankrupt's creditors, scheduled or not, which would lead to endless and insuperable difficulties, and frustrate the object of the section in giving immediate protection.

MONTAGUE SMITH, J. I am of the same opinion. By the Bankruptcy Act, 1861, the certificate of the filing and registration of the composition deed is to be available for all purposes as a protection in bankruptcy. Now a protection in bankruptcy gives the debtor an absolute right to be discharged, if in custody. But it is said, that the courts have put the construction upon the act, that the certificate shall not afford protection, if the deed itself is invalid. If the decisions referred to had not been questioned, we must have given effect to them; but I doubt whether, even then, they ought to have bound us, now that the question has arisen as a matter of strict law. Those cases were decided upon applications to discharge the debtor out of custody; and when the interference of the Court was invoked, they declined to interfere in a summary way if the deed was clearly invalid. It is well known that this court, when an appeal is made to its summary jurisdiction will, like a Court of Equity, refuse to interfere when it would be inequitable to do so, although their decision might be different if the matter were before them as a question of strict law. But the case of *Lloyd* v. *Harrison*, in the Exchequer Chamber (1), led to a judgment which certainly shews that when the case comes to be decided as

(1) Law Rep. 1 Q. B. 502.

a matter of law, those cases cannot be treated as authorities. It was there held that the sheriff is justified in discharging the debtor. If the decision rested there, the reasons for it would seem to me to lead to the consequence that if the sheriff *may* discharge the debtor he *must* do so. The legislature could not have meant to leave to the sheriff to decide whether he should, or should not, discharge him. It would be inconvenient, if not unconstitutional, to leave to a ministerial officer to decide whether he should execute the writ or not. Nor can the notice given to the sheriff, that the deed was invalid, make any difference. The deed was not said to be invalid upon the face of it, although I think that would not make a difference in the sheriff's duty, but only because it was not signed by the statutory number of creditors. Is it to be supposed the legislature intended the sheriff to decide whether the deed was sufficiently signed? He would have to inquire into all the debts in a way which it requires all the intelligence of the courts, to guide to a proper result. I cannot help thinking that Erle, C.J., had arrived at the same conclusion as ourselves, for in the judgment in *Harrison* v. *Lloyd* (1), he says, "the protection given to the debtor is not a mere privilege, but a right to be at once discharged." If he has a right, the Court must give him the corresponding remedy. It has been pointed out by my learned brothers, that the right course is, for the creditor to apply to the court of bankruptcy for leave to proceed, and then an inquiry may take place into the validity of the deed. I think the remarks of my learned Brother Byles on the difficulties that would otherwise arise are of great weight. Our judgment must be for the plaintiffs as the legitimate result of the decision in *Lloyd* v. *Harrison* (1), viz., that if the sheriff may discharge, he *must*.

Rule absolute.

May 6. *Robinson, Serjt.*, moved to have the money paid out of Court. The motion was opposed by *Nasmith*.

After a short discussion, BOVILL, C.J., said that the Court having come to the conclusion that the learned judge who made the order ought not to have imposed the condition, the rule must be

(1) Law Rep. 1 Q. B. 502.

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made absolute for payment of the money to Ames, but without costs.

Rule accordingly.

Attorney for plaintiff: *W. S. Masterman.*

Attorney for defendant: *T. S. Ashwin.*

May 8.

FORDHAM *v.* THE LONDON, BRIGHTON, AND SOUTH COAST RAILWAY COMPANY.

Railway Company; Negligence of a Servant—Contributory Negligence.

4 Ex 119

The plaintiff, a passenger by the defendants' railway, was in the act of getting into a third-class carriage at a station, the train not being in motion. Having a parcel in his right hand, he placed his left hand on the back of the open door to aid him in mounting the step. Before he had completely entered the carriage, the guard, without any previous warning, forcibly closed the door, and crushed the plaintiff's hand between the door and the door-post. In an action for the injury thus sustained:—

Held, by Byles and Keating, JJ., that the jury were justified in finding, in favour of the plaintiff, that the guard was guilty of negligence; and that there was no evidence of contributory negligence on the part of the plaintiff.

Held, by Montague Smith, J., that, by putting his hand in the position he did, knowing that the door was about to be closed, the plaintiff was guilty of negligence which contributed to the injury, and therefore was not entitled to recover.

Affd in Exch 4 C.P. 519

THIS was an action against the London, Brighton, and South Coast Railway Company, to recover damages for an injury sustained by the plaintiff through the negligence of one of the company's servants.

The cause was tried before Byles, J., at the Middlesex sittings after Hilary Term last. The facts were as follows:—The plaintiff, a passenger by the defendants' railway, at about eight o'clock in the evening, in the month of September, was in the act of getting into a third-class carriage at the Sydenham station, and, having a parcel in his right hand, he took hold of the back part of the open door of the carriage to aid him in mounting the step. Before he had completely entered the carriage, and before the train had started, the guard forcibly closed the door, and crushed the plaintiff's hand against the door-post; and for the injury thereby caused

the plaintiff brought this action. There was contradictory evidence on the part of the plaintiff and the defendants as to whether the guard gave any warning before he closed the door; but for the defendants it was contended that, assuming there was negligence on the part of the guard, the accident would not have happened if the plaintiff had not, instead of availing himself of the handle at the side of the door, improperly placed his hand upon the door itself, and that he was not entitled to recover, by reason of his own negligence which contributed to the injury.

The plaintiff's witnesses swore that there was no handle at all, or, if there was one, that it was too dark to see it.

The learned judge left it to the jury to say whether the injury was caused by the negligence of the defendants' servants, and whether the plaintiff had by his conduct so far contributed to the accident as to disentitle him to sue.

The jury answered the first question in the affirmative and the second in the negative, and accordingly returned a verdict for the plaintiff.

Huddleston, Q.C., in Hilary Term last, obtained a rule nisi to enter a nonsuit, on the ground that there was no legal evidence to support the verdict, or that there was clear evidence of contributory negligence on the part of the plaintiff; or for a new trial, on the ground that the verdict was against the weight of evidence.

Parry, Serjt., and *Campbell Foster*, shewed cause. The plaintiff was guilty of no negligence; and, if he was, it did not in any degree contribute to the accident, or the company's servant might by the exercise of reasonable diligence have avoided the consequences of it. To warrant a verdict for the defendants on the ground of contributory negligence, it must clearly appear that the plaintiff's negligence was such that without it the accident would not have occurred: *Tuff* v. *Warman*. (1) The act which caused the accident was the guard prematurely slamming to the door of the carriage; and, according to *Davies* v. *Mann* (2), although there may have been negligence on the part of the plaintiff, yet, unless he might by the exercise of ordinary care have avoided the consequences of the defendants' negligence, he is entitled to

(1) 5 C. B. (N.S.) 573; 27 L. J. (C.P.) 322. (2) 10 M. & W. 546.

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recover. *Greenland* v. *Chaplin* (1) is to the same effect, in which case Pollock, C.B., lays down the rule thus:—"A person who is guilty of negligence, and thereby produces injury to another, has no right to say, 'Part of that mischief would not have arisen, if you yourself had not been guilty of some negligence.' I think that, where the negligence of the party injured did not in any degree contribute to the immediate cause of the accident, such negligence ought not to be set up as an answer to the action." Assuming, therefore, that there was some degree of want of care on the part of the plaintiff, if the defendants' servants could by the exercise of reasonable care have avoided the consequences, the defendants are liable.

Huddleston, Q.C., and *Herschell*, in support of the rule. Unless there was reasonable evidence of negligence on the part of the defendants' servant, the learned judge should have withdrawn the case from the jury: *Cotton* v. *Wood.* (2) "Where," says Erle, C.J. (3), "it is a perfectly even balance upon the evidence whether the injury complained of has resulted from the want of proper care on the one side or on the other, the party who founds his claim upon the imputation of negligence fails to establish his case."

[BYLES, J. There was strong evidence to shew that the plaintiff's person was not fully in the carriage when the guard closed the door.

KEATING, J. In considering this branch of the rule, we must look at the case as it stood at the end of the plaintiff's evidence.]

In *Skelton* v. *London and North Western Railway Company* (4), the jury found that there was no contributory negligence, yet the Court held themselves bound to look at all the circumstances; and they came to the conclusion that the cause of the accident was the want of reasonable care on the part of the deceased. There was clearly evidence of contributory negligence on the part of the plaintiff here. And, even if the guard was guilty of negligence in shutting the carriage door before the plaintiff had got com-

(1) 5 Ex. 243, 247; 19 L. J. (Ex.) 293, 294.

(2) 8 C. B. (N.S.) 568; 29 L. J. (C.P.) 333. 7 Jun M S 1868.

(3) 8 C. B. (N.S.) at p. 571; 29 L. J. (C.P.) at p. 334. 7 Jun M S 1868.

(4) Law Rep. 2 C. P. 631.

pletely into the carriage, yet, if the former had no reason to anticipate that the plaintiff's hand would be placed where it was, the injury to the plaintiff cannot be said to be the proximate or natural consequence of the guard's negligence.

BYLES, J. I am of opinion that this rule should be discharged. The first question is, whether the verdict for the plaintiff should be set aside, and a verdict entered for the defendants, on the ground that there was evidence of contributory negligence on the part of the plaintiff. That question was left to the jury, and they found in the negative. No objection is taken to the direction; but it is now objected, on this branch of the rule, that the jury ought to have believed the evidence of contributory negligence, and to have found for the defendants.

It has been already observed by my Brother Keating, that, in considering this branch of the rule, we must look at the case as it stood at the end of the plaintiff's evidence. It is entirely a question for the jury whether they believed the defendants' evidence as to the negligence imputed to the plaintiff.

Now, negligence on the part of the defendants is not on this part of the rule disputed. The guard shut the door prematurely before the plaintiff had got completely in, and by shutting the door upon him shoved him on to the lap of a fellow-passenger, and by the same act jammed his finger between the door and the door-post. If the guard had not slammed the door when and as he did, the injury to the plaintiff would not have happened. I therefore disagree with the ingenious argument of Mr. Herschell when he says that the defendants' negligence was not the proximate cause of the injury. The finger was crushed by an impetus proceeding immediately from the guard. The guard's strength was the power at the other end of the lever.

What is the imputed negligence on the part of the plaintiff? No doubt, the position of the plaintiff's hand was the causa sine quâ non. The question for the jury was this,—was the position of the plaintiff's hand *at that moment* a negligence which caused the accident? The plaintiff was a third-class passenger. It was after dark. He saw no handle. According to his witnesses, there either was none to see or no light to see it by. He carried a bundle,

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which he had a right to take with him into the carriage. He had to mount with that bundle a considerable height. The train had not started. It was waiting. The plaintiff did not keep his hand where it was longer than was necessary to enable him to get into the carriage; for, he had not got in when the accident occurred.

The jury may have concluded from these facts that the plaintiff could not have got in otherwise than he did, and that he might reasonably suppose that the door would not be slammed upon him prematurely and without previous warning, and that, if this had not been done by the guard, no injury would have happened; so that what the plaintiff did was not originally negligence, and had not become negligence contributory to the accident.

The defendants then apply for a new trial, on the ground that the verdict was against the weight of evidence. With respect to this branch of the rule, at the trial I made several observations in favour of the defendants, perhaps some of them too strongly in their favour. I cannot but admit that, if the verdict had been in the defendants' favour, I should not at the time have disapproved of it. But it was a question for the jury; and it is now (speaking for myself alone) my duty to defer to the judgment of the jury. And I do it now the more readily, because I cannot help mentioning that I have since tried a case of a similar accident happening to another passenger about the same time, at the same station, from the same cause. (1) The jury may have been (as they often are) far better judges of fact than the judge presiding at the trial. It seems to me, therefore, that the finding should not be disturbed on either ground.

KEATING, J. I am of the same opinion. Undoubtedly, the cases upon this subject do run very fine, and it is not easy to determine what is a sufficient case to be left to a jury; but this, I think, was one which could not be withheld from them. Mr. Herschell has very ingeniously argued that, even if the guard was guilty of negligence in shutting the carriage door before the plaintiff had got completely in, still, as he had no right to anticipate that the plaintiff's hand would be where it was, the injury to the plaintiff's fingers cannot be said to be the proximate or natural consequence

(1) In which there was a verdict for the defendants.

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of the guard's negligence. But, upon the best consideration I am able to bring to the case, I think the accident was the result of admitted negligence on the part of the guard. It has been contended that my Brother Byles ought to have nonsuited the plaintiff, because of the contributory negligence on his part. But it seems to me that if he had taken upon himself to decide that question, he would have been stepping out of his province. It was not necessarily negligence in the plaintiff to put his hand where he did. It might have been evidence of negligence: but there might have been circumstances to induce the jury to think it was not negligence. At the close of the plaintiff's case, there was no evidence of there being any handle to enable a passenger to enter a carriage without placing his hand upon the door. Bearing in mind that the train was standing still at the time, and that the plaintiff had no notice that the door was about to be shut upon him, the jury might well have been warranted in finding that it was not negligence on his part to place his hand where it was. At all events, that was a question which the learned judge was bound to leave to them. As to the other branch of the rule, my Brother Byles reports to us that the verdict was not so contrary to the weight of evidence as to justify him in saying that he is dissatisfied with it. The rule will therefore be discharged.

MONTAGUE SMITH, J. I agree with my learned Brothers that it is difficult in these cases to determine what does and what does not amount to contributory negligence, so as to disentitle the plaintiff to complain of negligence on the part of the defendant. But it strikes me that the plaintiff in this case clearly was guilty of negligence which contributed to the injury which he sustained. He was getting into the carriage. Instead of availing himself of any assistance which might have been there, having a parcel in his right hand, he chose to place his left hand in a situation of danger, when he must have known that the door was likely soon to be closed from without. I should have thought res ipsa loquitur, and that the case might well have been withdrawn altogether from the jury. However difficult it may be to draw the line, I must confess I can come to no other conclusion from the evidence reported to us than that there was contributory negligence on the

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part of the plaintiff, and that he is not entitled to recover, but that the defendants are entitled to the benefit of the rule in *Tuff* v. *Warman*. (1) The misfortune of which the plaintiff complains would not have happened to him if he had not recklessly thrust his hand into a place of danger. There was, no doubt, some negligence on the part of the guard: but the injury to the plaintiff was not in my judgment the natural consequence of that negligence. The act of the guard only became the cause of the mischief by reason of the plaintiff having put himself in a position of danger. The difference of opinion on the part of the Court is rather on a matter of fact than of law. The majority, however, being in favour of the plaintiff, the rule will be discharged.

Rule discharged. (2)

Attorney for plaintiff: *H. Parry, Croydon.*
Attorneys for defendants: *Baxter, Rose, Norton, & Co.*

(1) 5 C. B. (N.S.) 573; 27 L. J. (C.P.) 293. 5 Jur. N.S. 222.

(2) In *Richardson* v. *The Metropolitan Railway Company*, which was tried before the Recorder in the Mayor's Court, London, on the 26th of May last, the facts were as follows:—The plaintiff got into a third-class carriage at King's Cross, placing his hand on the front edge of the door. When in, but before he could find a seat (the carriage being already full), a porter closed the door upon the plaintiff's thumb, and injured it severely. There was no evidence as to the state of the light; nor did it appear whether or not there was a handle by the side of the door. It was proved that, before closing the door, the porter called out, "Take your seats! take your seats!" and the plaintiff admitted that he had his hand on the door for half a minute after he had entered the carriage. It was objected, for the defendants, that there was no case for the jury. The learned Recorder gave leave to move to enter a nonsuit; but he left it to the jury to say,—first, whether there was negligence on the part of the servants of the company; secondly, whether the plaintiff by any negligence on his part contributed to the accident. The jury found both these questions in favour of the plaintiff, and returned a verdict for 20*l.* The Recorder reported that he thought the verdict wrong on both points.

H. James, in Trinity Term, obtained a rule nisi to enter a nonsuit. *Kemp* shewed cause, relying upon *Fordham* v. *Brighton Railway Company*.

THE COURT made the rule absolute, holding the case to be distinguishable from the principal case, on the ground that the porter had merely closed the door in the ordinary and proper exercise of his duty, after due warning; and that the accident was solely attributable to the plaintiff's own want of caution, in leaving his hand, after he had entered the carriage, upon a door which he must have known would be shut immediately. (3 H. & N. 190)

Attorney for plaintiff: *Haigh.*
Attorneys for defendants: *Burchells.*

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Marine Insurance—Jettison—General average Contribution, how estimated.

In ascertaining the general average contribution to be paid by the shipowner in respect of goods jettisoned, the value of such goods is to be taken to be the sum which it may fairly be assumed they would have been worth to the owner at the port of adjustment. If, from the circumstances, and the damaged condition of the rest of the cargo, it may fairly be assumed that the jettisoned goods would, if they had not been thrown overboard, have arrived in the like damaged condition, their value is to be taken to be the sum they would have realized as damaged goods.

A ship sailed from Liverpool for Calcutta with 2000 tons of salt on board, all belonging to one merchant. The day after she sailed, the ship struck on a bank on the Irish coast, and, after throwing overboard 1000 tons of the salt, was got off and put back to Liverpool, where the remainder of the cargo was unloaded and found to be all (with the exception of about 100 tons) so damaged as to be nearly unfit to be forwarded, and worthless. The charterer had paid 1250*l.* in advance for freight.

In an action by the owner against an underwriter on the ship, to recover a general average contribution in respect of the salt so jettisoned, upon a case stated for the opinion of the Court as to the principle by which the average-stater was to be guided in ascertaining the value of the jettisoned goods:—

Held, that, in ascertaining the contribution to be paid by the ship-owner to the owner of the cargo, in respect of the salt jettisoned, it was to be valued at the price which it would have been worth at Liverpool had it been brought back there, —the average-stater taking into account the probability of its arriving at the port of adjustment in a sound or a damaged state, or in a state in which it could have been forwarded, so as to take advantage of the pre-paid freight.

DECLARATION on a policy of marine insurance, averring a total loss of the ship by the perils insured against. Pleas: 1. Non assumpsit. 2. A denial of the loss. 3. Payment before action. Issue thereon.

The cause was tried before Blackburn, J., at the Liverpool winter assizes, 1866, when a verdict was found for the plaintiff for 200*l.*, subject to the opinion of the Court upon the following case:—

1. The plaintiff is a merchant carrying on business at Liverpool, and is the owner of the ship *Savoir Faire*. The defendant is an underwriter also carrying on business at Liverpool.

2. On the 5th of October, 1865, the plaintiff effected a policy of insurance on the *Savoir Faire* at and from London to Liverpool,

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while there, and thence to Calcutta. This policy was underwritten by the defendant for 175*l.*

3. In September, 1865, Messrs. Gladstone & Co., of Liverpool, purchased by order and for account of Messrs. Whitworth, of Manchester, a large quantity of salt, for shipment to Calcutta; and, in order to carry the salt to its destination, they chartered the *Savoir Faire*, and loaded on board her a cargo of salt, consisting of 1961½ tons. By the terms of the charterparty freight was to be 28*s.* per ton on the quantity delivered; such freight to be paid, 1250*l.* in cash on the sailing of the vessel, less three months' interest and cost of insurance, and the remainder on the right delivery of the cargo.

4. In cases where vessels are chartered to carry salt to India, it is the universal practice for the ship-owner to stipulate in the charterparty for payment in advance of from one-third to one-half of the freight, less the cost of insurance of such advance.

5. In the present case, Messrs. Gladstone & Co., under the provisions of the charterparty, paid to the plaintiff the lump sum of 1250*l.*, less cost of insurance effected thereon, on behalf of Messrs. Whitworth, on account of the freight of the *Savoir Faire*, before she sailed from Liverpool.

6. On the 6th of November, 1865, the *Savoir Faire* sailed from Liverpool for Calcutta, with the salt on board. On the 7th of November, she struck on a bank called the Blackwater Bank, not far from Wexford, on the coast of Ireland, and remained on this bank till the 12th of November, when she was floated off.

7. With a view to float the vessel off the bank, and so preserve her and the residue of the cargo, about 1000 tons of salt were thrown overboard. On the 13th of November, the ship was towed back to Liverpool; and on the same evening was hauled into the Canning Basin.

8. On the 18th of November, she was surveyed; and, in pursuance of the recommendation of the surveyors, the remaining cargo was discharged. It consisted of about 960 tons of salt, and was all damaged except about 100 tons, which was still sound. The salt which was found to be damaged had been damaged by water which had got through the bottom of the ship whilst she was on the bank, and during her voyage from thence to Liverpool.

9. The repairs of the vessel were proceeded with with all possible despatch; and, when she was nearly ready for sea, the plaintiff applied to Messrs. Gladstone & Co. for another cargo of salt. They, however, declined to furnish one.

10. If the 100 tons of sound salt had been re-shipped, it would have been necessary to have taken on board in addition 500 tons of ballast or cargo to stiffen the ship and render her fit for the voyage.

11. The salt brought back to Liverpool in the *Savoir Faire* was discharged on the quay; and, in consequence of the sound portion being placed in contact with the damaged portion, or from some other cause, the whole became more or less damaged, and was sold by auction, for the benefit of whom it might concern, with the concurrence of Messrs. Gladstone & Co., and only produced 35*l.*

12. As soon as the vessel was repaired, and Messrs. Gladstone & Co. had declined to provide another cargo, the plaintiff shipped a cargo of salt to Calcutta on his own account, which arrived quite safe, and was sold on arrival, at a considerable profit.

The question for the Court was, upon what principle the general average contribution of the ship-owner to the cargo owner in respect to the salt jettisoned should be ascertained: the plaintiff contending that, the value of the salt jettisoned should be taken to be either the price it would have been sold for at the port of destination, deducting freight, duty, and landing expenses; or the cost price of the salt plus the freight paid in advance, together with shipping charges and premiums of insurance: the defendant contending that the salt jettisoned should be valued at the price at which it would have been sold at Liverpool had it been brought back there; or that, if the freight paid in advance was to be taken into account in estimating the general average contribution to be paid by the cargo owner to the ship-owner, the freight at risk must equally be taken into account on the other side.

The parties were agreed that, after the Court should have decided the above question, the claims of the plaintiff against the defendant under the policy should be settled by an average-adjuster, to be named by a judge at chambers, and the verdict found for the plaintiff should be allowed to stand, or be reduced, or be

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vacated, and instead thereof a verdict for the defendant, according to his finding.

Temple, Q.C. (*C. H. Hopwood* with him), for the plaintiff. There are no decided cases in our courts as to the mode in which the value of goods jettisoned is to be estimated. The true principle would seem to be, to take the value of the goods at the port of destination, deducting the freight, duty, and landing expenses; or the cost price, plus the freight paid in advance, together with shipping charges and premiums of insurance: Arnould on Insurance, 3rd ed., by Maclachlan, 811: and, if the freight paid in advance is to be taken into account in estimating the general average contribution, the freight at risk must not be taken into account on the other side. It is true that Arnould, at p. 817, in common with the other text-writers on the subject, lays it down, that, "in case of a general average loss at the commencement of the voyage, and the ship in consequence putting back into the port of loading, the adjustment should be settled there; and the contributory value of the goods would be 'their cost on board, without insurance,' *i.e.* the amount of tradesmen's bills and shipping charges, 'such being the value at risk.'" But no rule is laid down for determining how near the port of departure the loss must take place; and there seems to be no reason why one rule should apply to the commencement and a different one to the conclusion of the voyage. The mode of stating this exception to the general rule in Benecke, p. 288, and in Abbott on Shipping, 11th ed. p. 550, and Phillips on Insurance, 3rd ed. s. 1364, is equally indefinite. Upon principle, the owner of the goods ought to be compensated for his loss of profit; and his right should not be affected by the circumstance of the vessel being compelled to put back to its port of departure. Here the vessel did go eventually to Calcutta, though with a fresh cargo put on board by the ship-owner: the case is, therefore, distinguishable from *Tudor* v. *Macomber* (1), in which the value of the goods at the port of shipment was adopted, on the ground that the vessel had never proceeded to her port of destination. Even if the goods are not to be estimated at their value at the port of destination, the plaintiff will be entitled, in

(1) 14 Pick. Mass. Ca. 34.

addition to the value of the salt at Liverpool, to the sum of 1250*l.* freight paid in advance, which cannot be recovered back, and is therefore within the meaning of "shipping charges."

Mellish, Q.C. (*Herschell* with him), contrà. The defendant is bound only to put the plaintiff in the same position he would have been in if his goods had not been jettisoned. Now, it is found by the case (par. 11) that the salt which remained on board was so much damaged that it realized only 35*l.* Suppose the owner of the salt which was jettisoned were not also the owner of that which was brought back—if he were paid its full undamaged value, he would not only be indemnified, but would gain largely by his goods being selected for the purpose of being thrown overboard. The passages from Arnould relied upon by the plaintiff relate only to the case where the remainder of the goods are uninjured: and Benecke, who seems to be followed by all the later text-writers, says, at pp. 289, 290: "If, after a jettison, or after a voluntary sacrifice of anchors, cables, &c., ship and cargo are entirely lost, no contribution can take place, because the articles sacrificed, had they remained in the vessel, would likewise have been lost; so that the situation of the proprietor would have been the same in either case. For the same reason, if part of the goods on board happen to be damaged during the jettison, or if part of the articles saved be afterwards damaged or destroyed, the proprietor of the goods cast overboard cannot be entitled to a restitution of the whole, whether the vessel reach the place of her destination or not; for, then he would be benefited by the jettison, to the prejudice of the other parties." This is adopted by Arnould (3rd ed. 809); but Phillips, in his edition of Stevens and Benecke (p. 231, n.), differs from it, but only to this extent, that he considers that the burthen of proving as a matter of fact that the goods jettisoned would have been damaged had they remained on board, rests upon the ship-owner; and that it is not to be assumed as a matter of law that they would have been in the same condition as the goods which remained on board. It will, however, lead to great difficulties if all the probabilities with regard to the goods have to be investigated; and the rule laid down by Benecke, though not strictly accurate, will probably lead to the least injustice. The value at the port of departure must

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be taken in this case, and not at the port of destination. By the Rhodian Code, the goods were always valued at their invoice price. The Consolato del Mare ordains that, if the accident happens in the first half of the voyage, the jettison shall be paid at cost-price, and if in the latter half of the voyage, at the price the goods would have realized at the port of discharge: Benecke, p. 287. But the rule now adopted in England, as appears from all the text-writers, is, that, if the jettison takes place near the port of departure, and the vessel returns to it, and the voyage is never completed, the value of the goods at that place is to be taken. Here, the voyage was never completed; for, although the vessel subsequently reached Calcutta, it was upon a totally different adventure. The freight paid in advance is not to be taken into account in estimating the general average contribution; for, if the goods had not been jettisoned, but had returned damaged to Liverpool, and been there sold, as the salt which remained on board was, the freight advanced would have been equally lost. If the rule laid down by Phillips be adopted, instead of that of Benecke, and the fact proves to be that the jettisoned salt, from better stowage, or for some other reason, could not have been injured, then a further question would arise, viz. whether the vessel could have proceeded to Calcutta with that portion of the cargo; as, if she could, the plaintiff might probably have earned the freight which he has lost. This shews the great difficulties which will result unless the practical rule as stated in Benecke, p. 290, be adopted.

Temple, Q.C., was heard in reply.

BOVILL, C.J. By this special case the Court is asked to decide the principle by which the average-stater is to be governed in estimating the general average contribution to be paid by the ship-owner to the owner of the cargo in respect of the salt jettisoned. Two principles were suggested in argument on the part of the plaintiff,—first, that the average-stater should take the value of the goods at the port of destination,—or, secondly, the invoice-price, plus the freight, shipping charges, and premiums of insurance. The defendant, on the other hand, insists that the proper estimate is, the value of the goods at the port of adjustment. Another subordinate question arises, as to what should

happen in the event of the goods arriving there in an unsound state, and what if they arrived perfectly sound. Speaking generally, I adopt the defendant's view, and not either of those suggested by the plaintiff. The general principle, as to which there is no serious doubt or difficulty, is, that, where the goods of one are sacrificed for the general safety of the whole, all are to contribute according to the benefit they severally derive therefrom. The rule is shortly and clearly stated in Marshall on Insurance, 4th ed. by Mr. Justice Shee, p. 424: "In the case of jettison, which is, where the goods of a particular merchant are thrown overboard in a storm, which may be lawfully done, to save the ship from sinking; or where the masts, cables, anchors, or other furniture of the ship are cut away or destroyed, for the preservation of the whole; or where salvage is paid to re-captors, or money or goods are given as a composition to pirates to save the rest; or where a ransom (when that was legal) was agreed to be paid to an enemy or pirate for liberating the ship; or an expense is incurred in reclaiming her, or defending a suit in a foreign court of Admiralty, and obtaining her discharge from an unjust capture or detention; in these, and the like cases, where any sacrifice is deliberately and voluntarily made, or any expense fairly and bonâ fide incurred, to prevent a total loss or some great disaster, such sacrifice or expense is the proper subject of a general contribution, and ought to be rateably borne by the owners of the ship, freight, and cargo, so that the loss may fall equally on all, according to the equitable maxim of the civil law, 'Nemo debet locupletari alienâ jacturâ.' The application of this principle was understood by the Rhodians, whose regulations on this subject were adopted into the Roman law, and make an important head in the Digest, under the title De Lege Rhodia de Jactu (1); the leading principle of which is, 'Omnium contributione sarciatur, quod pro omnibus datum est. . . . Æquissimum enim est commune detrimentum fieri eorum qui, propter amissas res aliorum, consecuti sunt ut merces suas salvas habuerunt.'" (2) The general principle thus stated is acted upon in all Courts and in all countries: but, in its application, different countries have adopted different rules. It becomes necessary in this case to ascertain and determine what rule is to prevail where

(1) Dig. lib. 14, tit. 2. (2) Dig. lib. 14, tit. 2, ss. 1 & 2.

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a ship has started on a voyage from one country to another, and, a jettison having taken place, the voyage has been brought to an end before her arrival at her port of destination. Where the adjustment is to take place at the port of ultimate destination, there seems to be no doubt as to the application of the principle upon which the estimate is to be made. I take the rule to be as stated in Marshall, 4th ed. p. 502, that, "in cases of general average, the things saved contribute, not according to the prime cost, but according to the price for which they may be sold at the time of settling the average. Non quanti emptæ sunt, sed quanti veniri possunt, is the rule of the Rhodian law. (1) The same is adopted in the laws of Wisbuy." (2) And, with regard to the adjustment at the port of destination, where the goods are delivered and freight earned, the goods are taken at their value at that place, including the freight. If, however, after the jettison or the matter which is the subject of average has arisen, the remainder of the goods are totally lost, and so no benefit accrues to the owners of the other goods from the jettison, no contribution can be claimed. The whole law on the subject is founded on the principle that the loss to the individual whose goods are sacrificed for the benefit of the rest is to be compensated according to the loss sustained on the one hand and the benefit derived on the other. In this case, the adventure being in progress, the vessel in consequence of the damage she had sustained put back to Liverpool. The ship might have been repaired, and might have prosecuted her voyage and completed the adventure. A large portion of the cargo, however, had been thrown overboard; the greater part of that which was brought to Liverpool was damaged, and not fit to be forwarded. The charterers, who had paid a large sum for freight, did not think fit to forward it. The ship was otherwise employed; and the voyage was broken up at Liverpool, at the time and under the circumstances stated in the case. Liverpool, therefore, was the place at which the average contribution was to be adjusted, and the time for adjustment was, on the arrival of the vessel at Liverpool. The adjustment must be according to the law of England; and it seems to me that the value must be determined at Liverpool. In dealing with the question at issue, which

(1) Dig. lib. 14, tit. 2, s. 4. (2) Art. 20 and 39.

is, the value at which the goods jettisoned are to contribute, the ultimate place of destination seems to me to have no application. The voyage having been broken up at Liverpool, Calcutta was not the place of adjustment. The value of the goods, therefore, at their ultimate port of destination has nothing to do with the question.

It is contended on behalf of the plaintiff, that, in order to arrive at the value of the goods jettisoned, for the purpose of the average contribution, you must take the value at the time of shipment, adding thereto the shipping charges and premiums of insurance, and the freight paid in advance. It seems to me that many of the rules which are found in the ordinary text-books upon the subject of average contribution, are rules rather of convenience than of positive law. Cost price, with shipping charges and premiums of insurance, will probably in most cases, pretty accurately represent the value of the goods in an undamaged condition, where they are not carried to their destination. But, though that may in most cases be a very convenient and correct rule, the amount of contribution must depend on the actual value of the goods jettisoned. Now, it is clear that the value of the goods at the time of the jettison is not to be taken as the test, because, if the whole adventure is afterwards brought to an end by the loss of ship and cargo, there will be no contribution at all. The rules as to contribution and adjustment seem to me to depend upon the probable state of things at, and to have reference to, the time and place of adjustment, that is to say, when and where the adjustment ought to take place. If the goods jettisoned were in such a condition that they would in all probability have arrived undamaged at the place of adjustment, I see no reason why their value at the time of the jettison should not be taken. It may be that they were packed in cases impermeable to water, so that they were not likely to receive damage from anything which might occur during the voyage. On the other hand, it may be that, if they had not been thrown overboard, they would not in all probability have arrived at their destination in a sound or saleable condition. In the latter case, what would be the loss of the person whose goods were thrown overboard? Clearly not the value of the goods in a sound state. In the present case, it is almost a matter

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of certainty that, if the salt which was jettisoned had remained on board, it could not have reached the port of adjustment, Liverpool, in a sound state. What, then, is the loss which the owner has sustained by the jettison? The only loss I can suggest is, the value of the salt if it had arrived in an unsound state. Here, the entire cargo was salt, consisting of about 2000 tons. Of these 1000 tons were thrown overboard. The rest, being brought to Liverpool, was found to be all damaged except about 100 tons. If we were asked to come to a determination upon the facts, I should have required a fuller detail than that which has been submitted for our consideration. But I am unwilling to send the case back, or to decline to lay down the principle by which I think the average-stater ought to be guided in making the adjustment. That principle is, I think, correctly stated by Mr. Arnould, in the passage relied on by Mr. Mellish, as follows (1): "If, after jettison of part, the rest of the cargo arrives in a damaged state, owing to causes which would equally have affected the goods jettisoned had they remained on board, the amount at which the jettisoned goods should be contributed for is, the net sum they would have realized in a damaged state." That is entirely in accordance with what is said by Mr. Serjt. Marshall (2): "The first price of a thing does not always afford a sure criterion to ascertain its true value. It may have been bought very dear or very cheap. The circumstances of time and place cause a continual variation in the price of things. For this reason, in cases of general average, the things saved contribute, not according to the prime cost, but according to the price for which they may be sold at the time of settling the average." The cost price of the salt under the circumstances of this case would not represent its value. What benefit did the owners of the rest of the adventure,—of the salt which was brought back,—derive from the jettison? It arrived in a damaged state. They clearly, therefore, could not be benefited to the extent of the cost price, but at the utmost to the value of that which they received back at the port of adjustment. If, then, that be the principle upon which the average is to be adjusted as against the owner of the goods brought back, justice would seem to require

(1) Arnould on Insurance, 3rd ed. vol. 2, p. 809.
(2) Marsh. Ins. 4th ed. p. 502.

that the same measure of value should in this case be applied to the goods jettisoned. If that be so, there are two different suppositions which the Court must deal with,—first, that the goods would arrive in a damaged state,—secondly, that they would arrive sound. If the salt which was thrown overboard would have arrived at Liverpool in a damaged state, I am of opinion that its value for the purpose of contribution to general average must be taken to be what it would realize in such damaged state. In all probability it would have arrived in the same condition as the rest arrived in; and therefore what happened as to that may be a very good guide for the average-stater: but we cannot lay it down as a rule of law. I do not see what other value the salt could have, if it was not worth forwarding, than what it would sell for at Liverpool; and, in that view, the freight paid in advance would not add one penny to its value. Then, take the other supposition. Assume that the salt which was jettisoned would, if it had not been thrown overboard, have arrived in a sound condition, either in whole or in part. There again the test is, to ascertain the value of the salt. In dealing with that question, regard must be had to the possibility that it might have been in such a condition as to make it worth the merchant's while to re-ship it as soon as the vessel was repaired and fit for the voyage. If that should appear to be the probable state of things, as the owner would not have sold the salt because its value was greater than its mere cost, inasmuch as he had paid freight upon it in advance, then a proportionate part of the pre-paid freight would seem properly to form an element in ascertaining its value for contribution. If the vessel was, as would appear to be the fact, in such a condition that she could reasonably have been repaired so as to pursue her voyage, the probability is that the salt, if undamaged, would have been re-shipped and carried to its port of destination; and so at the port of departure it would have been increased in value by the shipping charges, the premium of insurance, and the freight paid. Assuming the owners of the goods jettisoned and of the goods saved to be different persons, the contribution must be ascertained, with reference to the amount of loss actually sustained on the one side and the benefit derived on the other, at the port of adjustment. I do not think the average-stater will have any difficulty in ascertaining the facts

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and applying the principles I have endeavoured to lay down; and, if those principles are worked out by assuming the salt to have belonged to several owners, there will be no difficulty in arriving at an accurate result. It is quite impossible for us to arrive at a conclusion of fact upon the statement before us. All we can do, therefore, is, to state the principles for the guidance of the person upon whom that duty is cast.

BYLES, J. I am of the same opinion. My Lord having gone so fully into the matter, I will only add a word or two. Four questions seem to me to be presented for our consideration,—first, which was the proper port at which the adjustment was to take place,—secondly, what condition of the goods is to be taken for their value in respect of contribution,—thirdly, what rule is to be adopted for ascertaining the value of the goods jettisoned,—fourthly, whether the pre-paid freight can be added in the estimate of their value. I think it is quite plain that Liverpool is the port at which the amount of contribution is to be ascertained, because the voyage was broken up almost at the inception of the adventure. As to the value of the goods brought back, I agree entirely with what has been said by my Lord. The cost price is only an important element here because the ship returned to her port of departure. The value is what the goods will sell for. As to the value of the goods jettisoned,—their hypothetical condition if they had arrived at Liverpool,—that is a question of practice. How far that is to be judged of from the statement as to the condition of the goods which did arrive, it is not necessary for us to express an opinion upon. That being so, the port of adjustment being settled, and the value of the goods brought back, and of the goods jettisoned, the only question which remains is as to the pre-paid freight. The voyage being broken up, it is difficult to see how the prepayment of freight can affect the value of the goods.

MONTAGUE SMITH, J. I also am of opinion that the true principle for ascertaining the amount of contribution to general average has been correctly stated by Mr. Mellish. The owner of goods jettisoned is to be indemnified against loss; but he is not to be a gainer by the sacrifice of his goods for the general benefit. He is

not to be put in a better position than those whose goods have not been jettisoned. Applying that principle here, it is clear that the port of destination is not the port of adjustment for this loss. If the salt which was thrown overboard had not been jettisoned, it never could have reached the port of destination, but would have shared the fate of the rest of the adventure. The voyage was broken up. The authorities shew that where the vessel is obliged to return to the port of departure, that is to be taken as the port of adjustment. If that be so, how is the contribution to be estimated? According to the value of the goods in the condition they would have been in if they had not been jettisoned, but had arrived at that port with the rest of the goods. If they would have arrived in a damaged state, they clearly are not to be valued as sound goods, or at their cost price. The average-adjuster must take into consideration what would have been the state of the goods if they had remained on board and shared the fate of the rest of the adventure. In Arnould, 3rd ed. p. 803, it is said:—"The practical rule adopted is this: The property sacrificed for the general benefit is regarded as though it had never been lost, but actually was a portion of the whole mass of property on which the contribution is assessed at the time the adjustment is made." That seems to me to be the correct view. Where the entire remaining cargo perishes after jettison of a portion, there is no contribution, because there is nothing left to contribute. Where the remaining cargo reaches its destination, or is carried back (as here) to the port of departure, you must ascertain what would have been the value of the goods jettisoned, if they had not been thrown overboard, but had arrived with the rest of the adventure. It is for the average-stater to ascertain what that value is. If, as is probable, he should come to the conclusion that the salt jettisoned would have arrived at Liverpool in the same damaged condition as the rest, the value to sell in that condition should be the amount on which to assess the contribution. If, on the other hand, he thinks it would have arrived in a sound state, so that it might have been carried on, the cost price, with the shipping charges, premium, and pre-paid freight would be allowed. If the goods would have arrived in a damaged state, or the ship was so damaged that she could not be repaired so as to carry on the adventure, the value in their

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damaged condition must be taken; and, in that case, without the freight and charges.

Judgment accordingly.

Attorneys for plaintiff: *Norris & Allen, for Simpson & North, Liverpool.*

Attorneys for defendant: *Chester & Urquhart, for Lace, Banner, Newton, & Bushby, Liverpool.*

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*July 4.**

STAMPER, APPELLANT; THE OVERSEERS OF SUNDERLAND-NEAR-THE-SEA, RESPONDENTS.

Poor-Rate—Representation of the People Act, 1867 (30 & 31 *Vict. c.* 102), *Construction of s.* 7—*House wholly let out in Apartments not separately rated.*

By the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), s. 7, where the owner is rated at the passing of this Act to the poor rate in respect of a dwelling-house situate in a parish wholly or partly within a parliamentary borough, instead of the occupier, his liability to be rated for the future shall cease; and after the passing of this act no owner of any dwelling-house so situate shall be rated to the poor-rate instead of the occupier, except as hereinafter mentioned. . . . . When the dwelling-house shall be wholly let out in apartments or lodgings, not separately rated, the owner of such dwelling-house shall be rated to the poor-rate.

The appellant and five other persons each occupied a room in a six-roomed dwelling-house in a parish within a parliamentary borough, and had the use in common of the street-door, passage, staircase, and domestic conveniences; the owner did not occupy any part of the premises, nor retain any control over the tenants, each of whom had the exclusive possession of his own room. At the time of the passing of The Representation of the People Act, 1867, the owner was rated in respect of the whole house, instead of the occupiers, by virtue of the Small Tenements Act, 13 & 14 Vict. c. 99. After the passing of The Representation of the People Act, the overseers of the parish made a rate, in which each of the six occupiers was separately rated:—

Held, that the *owner* of the house, and not the several occupiers, was rateable: for that the house came within the exception in s. 7.

UPON appeal to the Durham quarter sessions against a rate made on the 20th of November, 1867, for the relief of the poor of the parish of Sunderland-near-the-Sea, the following case was stated

* This case is here reported in consequence of its immediate importance.

for the opinion of the Court of Common Pleas, under 12 & 13 Vict. c. 45, s. 11:—

1. A rate for the relief of the poor of the parish of Sunderland-near-the-Sea, was made by the overseers of the parish on the 20th of November, 1867, in which rate the six occupiers of a house or tenement situate at No. 5, Queen Street, within the said parish, were rated, each in respect of one room: the appellant's rating being 6*s.* 5*d.* on a rateable value of 3*l.* 10*s.*

2. The appellant, an occupier named in the rate of one of the rooms in the house, gave due notice of appeal against the same so far as he was affected thereby, upon the following grounds:—

"First. That, as an occupier of a room in the tenement, he was not by law liable to be rated to the relief of the poor of Sunderland-near-the-Sea.

"Second. That the room which he occupied in the said tenement was not a house or tenement liable to be rated or assessed to the relief of the poor of the said parish.

"Third. That the dwelling-house or tenement of which the room for which he was rated or assessed forms a part, was wholly let out in apartments or lodgings, and the owner of such tenement was liable by law to be rated or assessed in respect thereof to the relief of the poor of the said parish, and not the occupier of any separate apartments or lodgings in the said dwelling-house or tenement.

"Fourth. That he was not an occupier of any land, house, or tenement, within the parish, liable by law to be rated or assessed to the relief of the poor of the parish."

3. The parish of Sunderland-near-the-Sea is within the parliamentary borough of Sunderland.

4. The house No. 5, Queen Street, mentioned in the rate is one of the many houses in the parish which are wholly let out to different tenants in separate rooms.

5. The house was originally built and intended as a separate dwelling-house for the occupation of one family only. It is a six-roomed house, three storeys high, containing two rooms on each floor, namely, one room on each side of the passage and staircase. There is one outer or street-door, and a water-closet and other conveniences, all of which since the occupation of the house by

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the several tenants have been and are used in common by all of them. The six rooms in the house are tenanted by the six persons respectively whose names appear in the rate; and whatever furniture is in the room is the property of the tenant occupying the same. The owner, Thomas Lawson, does not reside in, or, by himself, his family, or servants, occupy any portion of the house; neither has he, nor does he exercise, nor is he entitled to have or exercise, any control or interference with the tenants, nor does he supply the tenants with any attendance or service of any kind or description whatever. Each tenant has the exclusive occupation of his or her own respective room, is liable to a week's notice to quit, and the rents are payable weekly by each.

The assessed-taxes or house-duty, the rates leviable under the Public Health and Local Government Acts, and the rent of the water supplied by the water company of the district for the purposes of the water-closet, are all paid by the owner of the tenement.

6. The Representation of the People Act, 1867 (30 & 31 Vict. c. 102), s. 7, enacts with regard to any parish situated either wholly or partly within a parliamentary borough, as follows:—

"Where the owner is rated at the time of the passing of this act to the poor-rate, in respect of a dwelling-house or other tenement situate in a parish wholly or partly in a borough, instead of the occupier, his liability to be rated in any future poor-rate shall cease; and the following enactments shall take effect with respect to rating in all boroughs:—

(1). "After the passing of this act no owner of any dwelling-house or other tenement situate in a parish either wholly or partly within a borough, shall be rated to the poor-rate instead of the occupier, except as hereinafter mentioned:

(2). "The full rateable value of every dwelling-house or other separate tenement, and the full rate in the pound payable by the occupier, and the name of the occupier, shall be entered in the rate-book:

"Where the dwelling-house or tenement shall be wholly let out in apartments or lodgings not separately rated, the owner of such dwelling-house or tenement shall be rated in respect thereof to the poor-rate: Provided as follows,—

(1). "That nothing in this act contained shall affect any com-

position existing at the time of the passing of this act, so nevertheless that no such composition shall remain in force beyond the 29th day of September next.

(2). "That nothing herein contained shall affect any rate made previously to the passing of this act, and the powers conferred by any subsisting act for the purpose of collecting and recovering a poor-rate shall remain and continue in force for the collection and recovery of any such rate or composition.

(3). "That, where the occupier under a tenancy subsisting at the time of the passing of this act of any dwelling-house or other tenement which has been let to him free from rates is rated and has paid rates in pursuance of this act, he may deduct from any rent due or accruing due from him in respect of the said dwelling-house or other tenement any amount paid by him on account of the rates to which he may be rendered liable by this act."

7. By the 61st section of the said act it is enacted, that, unless there is something in the context repugnant to such construction, the term "dwelling-house" shall include any part of a house occupied as a separate dwelling, and separately rated to the relief of the poor.

8. The 13 & 14 Vict. c. 99, intituled "An Act for the better assessing and collecting the poor-rates and highway-rates in respect of small tenements,"—commonly called "The Small Tenements Rating Act,"—received the Royal assent on the 14th of August, 1850.

9. After the passing of that act, it was duly adopted in and by the parish of Sunderland-near-the-Sea, and continued in force until the passing of the 30 & 31 Vict. c. 102.

10. From the 7th of October, 1850, the owners of small tenements in the parish the yearly rateable value whereof did not exceed 6*l*., were duly rated to the poor-rates levied in the parish, instead of the several occupiers of the same.

11. In the rate for the relief of the poor of the parish which was in existence at the time of the passing of the 30 & 31 Vict. c. 102, Thomas Lawson, the owner, was rated in respect of the said premises, 5, Queen Street, at a rateable value of 20*l*., "instead of the occupier."

The question for the opinion of the Court was, whether the

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appellant was liable by law to be separately rated in the said rate, as an occupier of a room in the said dwelling-house, being a part only of the said dwelling-house; and, if not so liable, what should be done or ordered by the Court in the premises.

Sir W. B. Brett (*S.G.*), (*Lovesy* with him), for the appellant, contended, that, as occupier of a room in a dwelling-house wholly let out in apartments or lodgings, the appellant was not liable under the 30 & 31 Vict. c. 102, s. 7, to be rated or assessed to the relief of the poor; that, to construe the words "not separately rated" to mean "not separately rateable," or "not *liable* to be separately rated," would be in effect introducing lodgers pure and simple,—a case already provided for by s. 4; that the room occupied by the appellant, as described in the case, was not "a part of a house occupied as a separate dwelling-house," within the meaning of the interpretation clause, s. 61; that, to exclude the case from the exception in s. 7, the rooms must have been separately rated *at the time of the passing of the act;* that the distinction between "dwelling-house" and "lodgings," depending on the principle of actual severance in structure of the house, as defined in *Cook* v. *Humber* (1) and *Henrette* v. *Booth* (2), was intended to be preserved by the act; and that, consequently, the person entitled and liable to be rated under the circumstances stated in the case was the owner, and not the several occupiers. Reference was also made to Sturges Bourne's Act, 59 Geo. 3, c. 12, s. 19, and to the Small Tenements Act, 13 & 14 Vict. c. 99.

Manisty, Q.C. (*G. Bruce* with him), for the respondents, submitted that the appellant, having exclusive possession of part of a house, and holding such part as a separate tenement, was liable under s. 7, as explained by the interpretation clause, to be separately rated in respect of such tenement; that the main object of the act was to extend the franchise, by establishing household suffrage, accompanied by rating and payment of rates, — an object to which the Court would endeavour to give effect; that the words "not separately rated" in s. 7 must be read as "not *liable* to be separately rated," and were intended to

(1) 11 C. B. (N.S.) 33; 31 L. J. (C.P.) 73.

(2) 15 C. B. (N.S.) 500; 33 L. J. (C.P.) 61.

apply, not to a case like the present, where the separate tenants of the apartments alone occupy the house, but to cases where the owner or landlord lets out the rooms, but himself resides in or keeps the control over a part of the house in such a sense as that he would be the occupier in point of law, and therefore rateable as occupier; that the appellant was not a mere lodger; and that the owner of a dwelling-house or tenement who does not occupy it is only liable to be rated in cases where the dwelling-house or tenement is wholly let to *lodgers*, who have no exclusive possession of the apartments they occupy. He referred to *Pitts* v. *Smedley* (1), *Toms* v. *Luckett* (2), *Reg.* v. *Smith* (3), and Nolan's Poor Law, 4th ed. vol. 3, p. 175.

Cur. adv. vult.

July 4. The following judgments were delivered:—

BOVILL, C.J. The appellant in this case is the occupier of one room in a house situate within the respondents' parish; and by a rate made for the relief of the poor on the 20th of November, 1867, he was rated at a sum of 6*s.* 5*d.* upon a rateable value of 3*l.* 10*s.* per annum, in respect of his occupation of that room. He appealed to the quarter sessions against the rate; and this special case has been stated in order to obtain the decision of the Court upon the question of whether he was liable to be so rated.

Although the question is brought before us in this form, the determination of it involves the general principle upon which parochial officers must act in rating similar property, and will thus necessarily affect the lists of voters in parliamentary boroughs, and the rights of persons to be placed upon the register.

The appellant in this particular case objects to be rated; and the parish officers are insisting that they have a right to rate him: but, in many cases, the position of the parties would be reversed. The parishes would probably prefer to rate the owners of small houses rather than the occupiers of the separate apartments; and the occupiers of the apartments might prefer to be rated, in order to obtain the qualification for being placed upon the register of voters. We have, however, to determine what is the proper con-

(1) 7 M. & Gr. 85. (2) 5 C. B. 23.

(3) 30 L. J. (M.C.) 74.

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struction to be placed upon the act of parliament, with reference to this and other similar cases.

The enactment, or rather the exception in s. 7 of the act of last session is, that, "where the dwelling-house or tenement shall be wholly let out in apartments or lodgings not separately rated, the owner of such dwelling-house or tenement shall be rated in respect thereof to the poor-rate."

The house in question contained six rooms, and is stated to have been wholly let out to different tenants (of whom the appellant is one) in separate rooms,—each tenant occupying one room, and all six tenants having the use in common of the street-door, passage, staircase, and other conveniences. The owner or landlord does not reside upon the premises, or occupy any part of them, or exercise any control over the tenants, each of whom has the exclusive possession of his own room.

The case, therefore, seems to come precisely within the description of a "*dwelling-house wholly let out in apartments:*" and the only remaining question is, whether, at the time this rate was made on the 20th of November, 1867, these apartments were "*not separately rated,*" within the meaning of this clause of the statute.

The apartments were not in fact separately rated at the time of the passing of the act, nor at the time when this rate was about to be made. If those words mean not separately rated at the time the act was passed, or at the time a rate is to be made, the exception would apply, and the owner of the house, and not the separate tenants of the rooms, ought to be rated, and the appellant would be entitled to succeed on this appeal. It was contended, however, for the parish, that the words "*not separately rated*" must be read as if they were "*not liable to be separately rated;*" and that they were intended to apply, not to a case like the present, where the separate tenants of the apartments alone occupied the house, but to cases where the owner or landlord let out the rooms, but himself resided in or kept the control over a part of the house in such a sense as that he would be the occupier in point of law, and therefore rateable as such occupier.

Upon the facts submitted for our consideration in this case, neither the owner nor landlord nor any person representing him resides in or occupies any part of the house; and that has always

been considered a material circumstance in determining whether the different parts of a house are to be considered as separate and independent dwellings or tenements: and, as each tenant of a room here has the sole and exclusive occupation and control over it, although he has the use of the other parts of the house in common with the other tenants, he must, I think, be considered as the occupier of a separate tenement, for rating purposes. Indeed, unless this be so, there would be no person who could be properly described as the occupier.

I think, therefore, that, under the statute of Elizabeth, and but for the exception in the 7th section of the act of last session, these separate occupiers of rooms would be liable to be separately rated to the relief of the poor. This, then, raises the difficulty as to the meaning and effect of the words "*not separately rated*," which are introduced into the exception in the 7th section, and which have given rise to the present question.

If those words mean "not *liable* to be separately rated," this part of the section would, in my view of the occupation of the rooms, have no operation upon the case, and the separate occupiers of the rooms must be rated. But if, on the other hand, they mean, not separately rated at the time of the passing of the act, or when the rate has to be made, then the exception would apply, and the owner of the house, and not the tenants of the several rooms, must be rated.

In considering what is the right interpretation of the exception, it is necessary to look to the other parts of the same section, to bear in mind the general scope and objects of the act, and to consider the exception with reference to the various other provisions which are contained in the act.

There is no doubt that the principal object and general scope of the late act were, to create a considerable extension of the parliamentary franchise, and in boroughs, by s. 3, to extend it (subject to certain qualifications) to occupiers of dwelling-houses who were rated to the relief of the poor; and, by the effect of the interpretation clause, s. 61, it was extended to occupiers of *any part of a house* occupied as a separate dwelling, and separately rated.

At the time the act was passed, in many places the parish officers were entitled to and did rate the owners of houses instead

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of the occupiers, under the Small Tenements Act and other statutes; and it is manifest that, so long as those acts and that system remained in operation, and the owners were rated instead of the occupiers, the occupiers of those houses or parts of houses, not being rated, could not under the 3rd section of the act be properly placed upon the register of voters.

The 7th and 8th sections of the act were no doubt introduced in order to alter the previous system of rating the owners instead of the occupiers, and to make the occupiers again rateable, with a view to the parliamentary franchise. The first part of the 7th section enacts that the rating of the owner instead of the occupier is to cease; and the effect of the 8th section is, to make the previous rating of the owner, or his liability to be rated instead of the occupier, at the time the act was passed, coupled with the subsequent actual rating of the occupier, a sufficient rating for the purpose of the occupier being placed upon the register.

The language of the 7th section, so far as it is material to the present question, is as follows:—"Where the owner is rated at the time of the passing of this act to the poor-rate in respect of a dwelling-house or other tenement situate in a parish wholly or partly in a borough instead of the occupier, his liability to be rated in any future poor-rate shall cease, and the following enactments shall take effect with respect to rating in all boroughs:

"1. After the passing of this act, no owner of any dwelling-house or other tenement situate in a parish either wholly or partly within a borough shall be rated to the poor-rate instead of the occupier, *except as hereinafter mentioned.*

"2. The full rateable value of every dwelling-house or other separate tenement, and the full rate in the pound payable by the occupier, and the name of the occupier, shall be entered in the rate-book.

"Where the dwelling-house or tenement shall be wholly let out in apartments or lodgings not separately rated, the owner of such dwelling-house or tenement shall be rated in respect thereof to the poor-rate."

These enactments are not confined to dwelling-houses or parts of houses, but apply to all tenements, and are of general application to the then-existing laws for rating to the relief of the poor;

and in terms and in substance they seem to apply to all cases in which at the time of the passing of the act the owner was rated *instead of the occupier*, viz. where the occupier was liable to be rated under the statute of Elizabeth, but by reason of some general or special statute was not so rated, and where the owner was rated in place of the occupier.

By the first part of the enactment in s. 7 and the first sub-enactment, it is clear that the rating of the owner was to cease in all cases "*except as thereinafter mentioned*," and then comes the exception upon which the present question arises, and which is introduced by way of qualification upon the previous general enactments in the same section.

Now, in the first place, it seems to me that this clause was intended to be an exception from and to apply in cases which came within the principal enactment, viz. in cases where there was an occupier who would have been liable to be rated as such under the statute of Elizabeth, but where the owner instead of such occupier was rated under the provisions of some other statute; whereas, in the case put by Mr. Manisty, and to which he contended the exception was intended to apply, viz. that of the owner occupying or having control over part of the house, the owner would be the person properly rateable as the legal occupier. That would not be a case of the owner being rated instead of the occupier, and there would therefore have been no occasion for the exception. The principal enactment in the first part of the section would not include such a case, and the exception therefore would be wholly unnecessary.

It further appears to me that both in the 7th and in the 8th sections, *the time of the passing of the act* is made the dividing point with reference to the rating and liability to be rated of the owner instead of the occupier; and I think the words "not separately rated," in the exception, must also be construed as having reference to the same time, viz. the passing of the act.

It is further to be observed that, in the very next section, the 8th, the legislature, in referring to the rating of the owner at the time of the passing of the act, use the words "*is rated*" or "*is liable to be rated*," which shews that they were fully alive to the difference between the two expressions: and this makes it still

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more difficult to read the words "*not separately rated,*" in the exception, as meaning "not *liable* to be separately rated," as contended for by the respondents.

Again, the exception mentions *lodgings* as well as apartments; and in the case of lodgers no rating is required: their right to be placed upon the register being specially provided for by the 4th section.

Upon these grounds, and after the best consideration which I have been able to give the matter, it seems to me that this is a case in which "*the house was wholly let out in separate apartments not separately rated,*" within the true meaning of the exception, and that the owner of the house, and not the occupiers of the separate apartments, must therefore be rated in respect of it.

The owner not being a party to these proceedings, and it not being stated what is the amount upon which he ought to be rated, we are not in a position to say how the rate should be amended; and the proper course will therefore be that it should be quashed.

BYLES, J. I am of opinion that the assessment of the appellant is wrong. I collect from the case that the appellant, though he may be called a *lodger* in the popular sense of that word, is more than a mere lodger in its strict legal sense; for, he has the exclusive occupation of a particular room, and has a right to use the outer door, the staircase, and other conveniences, as easements appurtenant to his occupation; the owner not residing on the premises, and therefore not retaining his control over the outer door, or his character of master, or paterfamilias. I therefore think the tenant was before the statute 30 & 31 Vict. c. 102, liable to be rated. But I think the late statute takes away that liability, and shifts it on the owner.

Sub-section 1 of s. 7, and the exception ingrafted thereon, appear to govern this case. The effect of the rule and exception is this,—

The rule is, *no owner is to be rated instead of the occupier.*

The exception is this,—except where the house is wholly let out in *apartments or lodgings* not separately rated; and, in cases falling within this exception, the owner shall be rated.

An exception implies that the case excepted is one which, but

for the exception, would have fallen within the rule. The rule here applies only to cases where there is *occupier* as well as owner; so, therefore, does the exception. The excepted cases, therefore, include cases of *occupation*, properly so called. It follows that the apartments or lodgings mentioned in the section include rooms of which the tenant is occupier, and for a trespass to which he could bring an action of trespass.

The effect of the enactment in the present case is, to make the owner rateable instead of the tenant. The words "not separately rated" introduce some difficulty, and their meaning is very doubtful.

The appellant has contended that they mean, not separately rated at the passing of the act; the respondents, that *rated* means *rateable*, or that the words "separately rated" mean actually rated before, or by the rate in question. Some violence to the words, or some difficulty, attends both constructions, perhaps attends any construction. Possibly the words mean not separately rated as being "*separate dwellings*," like the flats in Edinburgh or the houses in Victoria Street. But, as without those words the sense of the clause seems to be clear, and as there is (to say the least) no more difficulty in bending those words to fit that clear sense than to fit any other sense, the presence of those words does not seem to me to preclude the appellant's construction of the clause.

There are other considerations which tend to the conclusion that the owner, and not the occupier, is in this case the person to be rated.

The main object of the act (as appears from the preamble) was, to amend the laws relating to the representation of the people. Any alteration in the law of rating was secondary and subsidiary to the main object. In settling the qualification for voting in boroughs, the governing intention seems to have been to confer the franchise on every ordinary rated occupier of a dwelling-house (which expression by the interpretation clause includes not every dwelling, but only every "separate dwelling"), and to exclude from the franchise lodgers, unless their lodgings were worth, if unfurnished, 10*l.* a year.

The word "lodger" is nowhere defined in the act; and s. 4, subsection 2, speaks of him as *occupying* separately and as sole tenant

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part of a dwelling-house. From all which it may be argued that the legislature, even in s. 4, did not use the words "lodger" and "lodgings" in their narrow and strict legal sense, but in the popular sense, so as to comprehend occupiers of rooms, where the rooms form part of a dwelling-house, and were not intended and constructed to form complete separate dwellings, as they do in the flats of Edinburgh, in the chambers in the Inns of Court, or in the houses in Victoria Street.

Flats are as much separate dwellings as ordinary adjoining houses are. The difference is, that flats are under one roof, and are divided one from another by a horizontal plane, but ordinary adjoining houses by a perpendicular or vertical plane.

And, independently of the introduction in s. 4 of the word *occupy*, it may be remarked that it is a recognized rule in the construction of acts of parliament, that words are to be taken in their ordinary and popular sense, unless the context requires a different sense. It may be, therefore, that the appellant is within the meaning of the statute a *lodger;* but that precise question is perhaps not before us.

For these reasons I think the occupier in this case is not now liable to be rated, but that the owner is liable.

MONTAGUE SMITH, J. The appellant complains that he is rated to a poor-rate made for the parish of Sunderland, for one room occupied by him in a house. The rateable value of the room appearing on the rate is 3*l.* 10*s.*

I am of opinion that the appellant is not liable to be so rated.

The case finds that the house, consisting of six rooms, was built and intended for the occupation of one family only; and the structure apparently remains in its original state. The six rooms are let in separate rooms to six persons. There is only one street-door, and one set of domestic offices, which are used in common by the six occupiers. The owner does not reside in the house or exercise any control over the occupiers.

At the time of the passing of the Representation of the People Act, 1867, the owner was rated for the house, the rateable value of which was 20*l.*, and, as appears in the rate, "instead of the occupier," by virtue of the Small Tenements Act, 13 & 14 Vict.

c. 99, the provisions of which were then in force in Sunderland.

The question in the appeal turns on the construction of the 7th section of the Representation of the People Act, 1867, and especially of an enactment found, in the shape of an exception, in that clause.

It will be necessary, in order to ascertain the scope and meaning of the enactments in the 7th clause, to advert shortly to the two clauses defining the qualifications of voters in boroughs. The 3rd clause defines "the occupation franchise," and requires as part of the qualification the rating of the voter "as an ordinary occupier." The 4th clause defines "the lodger franchise," and confers the right to vote on a man who "as a lodger has occupied separately and as sole tenant lodgings." Rating forms no part of this qualification. The 3rd clause contains all that need have been enacted to carry out the intention of the legislature as regards rating, if rating had depended simply on the statute of 43 Eliz. "for the relief of the poor." But, in several places, owners were rated, instead of the occupiers, in respect of small tenements by virtue of statutes passed for the purpose; and the legislature found it necessary to deal with the state of things which so existed. Hence the clause in question, which is in terms a rating clause, and nothing more.

This clause (the 7th) does not expressly refer to the Small Tenements Acts: but, assuming the existence of the mode of rating introduced by them, and confining the new legislation to parliamentary boroughs, enacts that, "where the owner is rated at the time of the passing of the act in respect of a dwelling-house or other tenement, instead of the occupier, his liability to be rated in any future poor-rate shall cease." The clause then proceeds to enact, that, "after the passing of the act, no owner of any dwelling-house or other tenement shall be rated to the poor-rate instead of the occupier."

If the clause had stopped there, it would have been clear. But it adds, "except as hereinafter mentioned." These words clearly point to an exception in which provision will be made for some cases where, after the passing of the act, owners shall still be rated "instead of the occupiers."

The exception, which is in imperative words, runs as follows:—

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"Where the dwelling-house or tenement shall be *wholly* let out in apartments or lodgings, not separately rated, the owner of such dwelling-house or tenement *shall* be rated in respect thereof to the poor-rate." This exception clearly keeps alive or re-enacts the liability of the owner to be rated instead of the occupier in one class of cases; and the question is whether the case of this house falls within that class. Now, when the rate appealed from was made, the house was wholly let out in single rooms, which were not separately rated; and it would certainly seem that a house so let out is a house wholly let out in apartments or lodgings, in the ordinary and popular sense of those words. If this house does not answer the description, it is difficult to suggest a case which would do so. The exception clearly cannot apply to the case of houses in which the owner lives, and takes lodgers to live in the same house with him; for, the enactment expressly deals with a house "wholly" let out in lodgings, and therefore assumes to deal with houses in which the owners do not live, but wholly and entirely let them out, as in this case.

Strong support is given by previous legislation to this view of the enactment. The words are evidently taken from Sturges Bourne's Act, 59 Geo. 3, c. 12, s. 19, which describes houses "let out in lodgings or in separate apartments." That act, in order to remedy the mischief arising from the evasion of the payment of rates in such cases, makes provision for rating the owner instead of the occupiers. In introducing the same words into the exception with which we are dealing, and which has the same object as Sturges Bourne's Act, viz. to render the owner liable to be rated instead of the occupier, in a certain class of cases, it seems reasonable to presume that the legislature was dealing with the same sort of apartments and lodgings as those described in the former act. Now, it is, I think, clear that the rooms in this house in Sunderland exactly answer the description of apartments in Sturges Bourne's Act. That act dealt with rooms so occupied as to be rateable under the statute of Elizabeth; and these rooms would be, as rightly contended by the respondents, rateable under that statute, if no other legislation had intervened. If, then, these rooms do fall within the description of Sturges Bourne's Act, the inference is very strong that they were intended to be comprised in the

enactment with which we are now dealing, which employs the same language for the same object as the former act.

As far as I can collect the intention of the legislature from the language used, it is meant to make a distinction between the occupiers of mere rooms and apartments in an ordinary house, and the occupiers of small houses, and of parts of houses as defined in the interpretation clause, i.e. occupied as "separate dwellings," such as chambers in the Inns of Court. The first are really and practically lodgers, differing from lodgers, properly so called, only in this, that the owner does not live in the house, but lets it out wholly, instead of partially, in lodgings. The legislature may well have intended that the occupiers of mere apartments should not be rated as "ordinary occupiers;" and it may have been governed by two considerations in making the distinction to which I have adverted,—first, the great inconvenience of assessing the occupants and collecting the rates of separate rooms in houses of this description, as a purely rating question,—secondly, the anomaly which might exist in the franchise, if a lodger, properly so called, that is, a man who lived in a house partially let out in lodgings, was not entitled to the franchise, unless his lodgings unfurnished were of the value of 10*l.* a year, whilst the man who occupied one room in a house *wholly* let in lodgings was entitled to it, however small the value of his room might be.

The great difficulty in the construction of the enactment arises from the words "not separately rated."

It was contended for the respondents that those words limit the operation of the exemption to the case where the rooms are not separately liable to be rated; and that "rated" must be read "rateable." But, first, the legislature has used the word "rated;" and I cannot construe it to mean "rateable," unless the context compels me to do so. But the context leads to a contrary conclusion. If "rated" is to be read "rateable," and the exception is to be construed to be confined to apartments not liable to be rated as separate tenements, by reason of the occupiers being mere lodgers only, the whole enactment becomes inoperative, because on the hypothesis, the owner would by the statute of Elizabeth, and without the enactment, be rateable; and the owner certainly never could be rated "instead of the occupier," because, on the hypo-

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thesis, there is no other occupier liable to be or who could be rated. The words cannot, therefore, I think, be read in a way which would render the enactment in which they are formed meaningless and nugatory.

Again, the words cannot mean that, in case, after the passing of the act, the apartments shall in fact be separately rated, the owner shall not be rated, because that would in effect be to give to the overseers an election to rate the occupiers or the owner, which cannot be presumed to have been the intention. But, if that were the proper construction, it could not avail the respondents in this case; for, at the time of making the rate appealed from, the occupiers were not in fact rated. The words "not separately rated," are satisfied by holding them to mean, not separately rated at the time of the passing of the act; and they may have been introduced to leave cases, if any, where apartments in a house wholly so let out were at the time of the passing of the act separately rated, in statu quo,—unaffected by the exception. This limited meaning is not inconsistent with the general intention which seems to pervade the enactment, viz. an intention to put the occupiers of lodging in an ordinary house *wholly* let out in lodgings, and the owner of a house so let, in the same position as the occupiers of lodgings in a house *partially* so let out, and the owner of such house.

I have endeavoured to reach the mind of the legislature through the words they have used, adopting the rule of construction given by Lord Wensleydale in *Rex* v. *The Inhabitants of Banbury* (1), where that learned judge says: "The rule of construction is, to intend the legislature to have meant what they have actually expressed, unless a manifest incongruity would result from doing so, or unless the context clearly shews that such a construction would not be the right one."

The above construction will not, as I have before incidentally observed, affect the case of occupiers of apartments in houses so constructed as to be occupied separately, and which by actual severance are separate dwellings, as, chambers in the Inns of Court. These, if not dwelling-houses, are clearly parts of houses "occupied as separate dwellings," and are not, as I think, "apart-

(1) 1 A. & E. 142.

ments or lodgings" within the meaning of those words in the 7th clause.

It was made a question during the argument, whether the room occupied by the appellant was a "dwelling-house" at all within the meaning of the act, even as dwelling-house is interpreted, and whether the distinction between dwelling-house and lodgings, depending on the principle of actual severance in structure of the house, as defined in the cases of *Cook* v. *Humber* (1), and *Henrette* v. *Booth* (2), was not intended to be preserved by the late act. I do not think it necessary to decide whether the room in question ought to have been deemed to be part of a house, as defined in the interpretation clause, or not, supposing the case had to be decided on that ground alone, and the exception in the seventh section had not been introduced into the act; because I think, for the reasons already given, this room is an apartment or lodging within the meaning of that exception, and that the liability to be rated is governed by that enactment.

The consequence will, no doubt, follow, that the present appellant will only be entitled to vote, if at all, upon the lodger franchise. The question of the right to vote is not directly before the Court: but reasons may be suggested for considering the occupiers of the house in question to be "lodgers," within the meaning of the 4th clause. It may not be necessary to confine the meaning of the words "as a lodger" to lodgers properly so called, in a statute which (in the 7th clause) uses the words a house "wholly let in lodgings:" and it may be that the statute can be so construed as to include under the term "lodgers" both the persons who live in houses partially let out in lodgings, and in which the owner resides, and those who live in houses wholly let out in lodgings, especially where, as to the latter class, the owner of the house is made liable to be rated. The word "lodgers" is not defined in the act; but the provisions to which I have adverted may tend to shew that the word was not used in the confined sense of "mere lodgers"—to quote the words of Maule, J., in *Toms*, app., *Luckett*, resp. (3),—but in a more enlarged sense, intended to

(1) 11 C. B. (N.S.) 33; 31 L. J. (C.P.) 73. 9 Jur. N.S. 690

(2) 15 C. B. (N.S.) 500; 33 L. J. (C.P.) 61. 9 Jur. N.S. 1293.

(3) 5 C. B. 23.

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describe the occupants of lodgings such as those existing in the present case, which are neither houses, nor severed and separate dwellings, such as chambers and flats.

It was said by the Court in *Cook* v. *Humber* (1), that "a lodger is a tenant, if the premises are let to him." There is no doubt that that is so, although the owner lives in the same house; and that for many legal purposes there is no distinction, as regards the occupants of lodgings, between the cases where the house is partially let out and where it is wholly so let out, provided that the lodgers in each case have the right to the exclusive possession of their own rooms.

The 8th section does not seem to me to advance the argument for the respondents; for, that clause is framed to make provision for the first registration of occupiers in cases where the owner is no longer liable to be rated in their stead, and does not affect the point arising for our decision, which turns on the question whether the owner in the particular case is not still so liable.

If the above construction be correct, the operation of the 7th clause, taken as a whole, will be, that occupiers of small houses, and of separate parts of houses, as chambers, will for the future be liable to be rated, notwithstanding the Small Tenements Acts, whatever the value of their holding, and that the owner will no longer be rateable in respect of them; and, so far as rating is concerned, such occupiers will be qualified to vote upon the occupation franchise; but that, as regards the occupiers of lodgings, where the house is wholly let out in apartments, as in this case, not separately rated when the act passed, the owner and not the occupiers must be rated, and the occupiers will be entitled to vote, if at all, upon the lodger franchise.

For the reasons I have given, I think the appellant is entitled to our judgment, and that the rate must be quashed.

Judgment for the appellant.

Attorneys for appellant: *Shum & Crossman, for Kidson, Sunderland.*

Attorneys for respondents: *Young, Maples, Teesdale, & Nelson, for H. B. & C. Wright, Sunderland.*

(1) 11 C. B. (N. S.) 33; 31 L. J.C.P.) 73.

SHACKLEFORD, FORD, & Co., LIMITED, *v.* DANGERFIELD.
SAME *v.* OWEN.

1868
April 18.

Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 13—*Change of Name—Notice of Call—Surrender of Shares—Construction of Resolution.*

A new certificate of incorporation is necessary to complete a change of name by a company under s. 13 of the Companies Act, 1862. It is not enough that the change has been sanctioned by a special resolution of the company and approved by the Board of Trade.

On the 18th of July, 1867, a company duly passed a resolution to change its name, which resolution was confirmed on the 9th of August. On the 23rd of August the directors made a call in the old name of the company. On the 7th of September the approval of the change of name by the Board of Trade was obtained; and on the 13th notice of the call, in the new name, was given to the shareholders. On the 31st of December, 1867, an action in the old name was brought against a shareholder who knew of the proposed change of name, to recover the amount of the call. The certificate of incorporation in the new name was not issued until the 13th of February, 1868:— ✓

Held, that the action was properly brought in the old name of the company; and that the notice of the call in the new name was sufficient, as it in fact gave the defendant notice that the call had been made.

The company passed a resolution authorizing the directors, "if they should think fit," to accept transfers from such shareholders as should give notice of their willingness to surrender their shares:—

Held, that this was not binding on the company as an agreement to accept such surrenders.

ACTIONS for calls. The declaration in each case was in the usual form, and alleged that the plaintiffs were a company formed and registered under the Companies Act, 1862.

Pleas in each case: 1. That the plaintiffs were not nor are a company formed and registered under the Companies Act, 1862. 2. Never indebted. The defendant Dangerfield pleaded besides these pleas: 3. That the call was not made by the plaintiffs. 4. By way of equitable defence, that, before the making of the calls, it was agreed between the plaintiffs and the defendant that the shares of the defendant should be transferred and surrendered by the defendant to the plaintiffs at a time that had elapsed before the making of the call; that the defendant should thenceforth cease to be a shareholder in the plaintiffs' company, or liable for calls made by them; that the defendant then was and always had been ready and willing, and then offered to transfer and surrender

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his shares to the plaintiffs, and then requested them to accept the same, but the plaintiffs refused to and did not accept the shares, or cause him to cease to be the registered owner thereof, and they compelled the defendant to remain the registered owner of the shares; and that since the breach of contract the defendant had never consented to remain the registered owner of the shares, nor had ever received any benefit from the shares, and he immediately repudiated the shares and all title thereto, and all liability in respect thereof, and gave notice of his repudiation thereof to the plaintiffs. Issue thereon.

Both cases were tried before Kelly, C.B., without a jury, at the last assizes at Gloucester. The facts in both were similar, and were as follows:—The company was incorporated on the 1st of May, 1866, by the name of "Shackleford, Ford, & Company, Limited;" the objects of its incorporation being, "to acquire the works, plant, stock-in-trade, name, &c., &c., of Messrs. Shackleford, Ford, & Co., and to carry on and extend their business," &c. The defendant Dangerfield was registered holder of 989 shares; and the defendant Owen was registered holder of 200 shares. On the 2nd of July, 1867, notice was given of a general meeting of the shareholders to be held on the 18th, for the transaction of ordinary business, and to consider certain matters specified in the notice, one of which was a proposal to change the name of the company; the meeting was duly held, and the following amongst other resolutions were come to:—

"1. That the name of the company be changed to 'The Cheltenham and Swansea Railway Carriage and Wagon Company, Limited.'

"4. That the directors be authorized (if they shall think fit) to accept, in the name and for the benefit of the company, from such shareholders as, having fully paid up the amount due upon the shares now held by them, are desirous to retire from the company, and have accordingly signed the form No. 2, sent to the shareholders on the 15th of June last, a transfer or surrender of their shares; and that, upon such transfer or surrender to the company being completed by any such shareholder, the shares therein comprised shall merge and become extinguished in the capital of the company, and the company shall thenceforth hold the

transferor or surrenderer harmless from any further liability in respect of the shares so transferred or surrendered: provided always that the total number of shares to be so accepted by the company shall not exceed 3000 shares."

Both of the defendants were aware of these resolutions, which were duly confirmed on the 9th of August, 1867. On the 7th of September, 1867, the approval of the Board of Trade of the change of name was obtained; but the certificate of the registrar of joint-stock companies was not obtained until the 13th of February, 1868.

The call (of 1*l.* per share) in respect of which the actions were brought was made on the 23rd of August, 1867, in the name of "Shackleford, Ford, & Co., Limited," and was payable on the 5th of October. The notice of the call was issued to the shareholders on the 13th of September, in the name of "The Cheltenham and Swansea Railway Carriage and Wagon Company, Limited." The actions were commenced on the 31st of December, 1867, in the name of "The Cheltenham and Swansea Railway Carriage and Wagon Company, Limited;" but subsequently, under a judge's order, the declaration was amended by substituting the name of "Shackleford, Ford, & Company, Limited," as the plaintiffs.

The defendant Dangerfield before the call was made elected to take advantage of the resolution of the 18th of July, and duly signed and transmitted to the secretary the form therein referred to, offering to surrender the whole of his 989 shares. The directors, however, only accepted his surrender as to 289 shares, although the limit of 3000 would not have been exceeded if they had accepted his surrender as to the whole 989 shares.

It was contended for both defendants, that the company, having changed their name, under s. 13 of the Companies Act, 1862 (1)

(1) Which enacts that "any company under this Act, with the sanction of a special resolution of the company passed in manner hereinafter (s. 18) mentioned, and with the approval of the Board of Trade, testified in writing under the hand of one of its secretaries or assistant secretaries, may change its name, and, upon such change being made, the registrar shall enter the new name on the register in the place of the former name, and shall issue a certificate of incorporation altered to meet the circumstances of the case; but no such alteration of name shall affect any rights or obligations of the company, or render defective any legal proceedings instituted or to be instituted by or against

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could not legally do any act until they had obtained a certificate of incorporation in their new name, and that consequently the call and notice were invalid; and it was further insisted on behalf of the defendant Dangerfield, that he had by the surrender of his shares ceased to be a shareholder before the call in question was made.

The learned judge directed a verdict to be entered for the plaintiffs in each case, for 700*l.* against Dangerfield, and for 200*l.* against Owen; reserving leave to the defendants to move to enter the verdicts for them respectively.

April 17. *H. Mathews, Q.C.*, moved accordingly on behalf of the defendant Owen. To make the call valid, it must be valid as against all the shareholders in the company. Although the call was properly made in the name of Shackleford, Ford, & Co. (who had not ceased to exist under that name until they had legally acquired their new name), the notice of the call, which was in the name of "The Cheltenham and Swansea Railway Carriage and Wagon Company, Limited," was bad as against those shareholders who had no notice or knowledge of the change of name; and, if so, it was bad as against all.

[MONTAGUE SMITH, J. That seems to be contrary to the opinion expressed by Parke, B., in *Newry and Enniskillen Railway Company* v. *Edmunds.* (1)]

The utmost that this opinion amounts to is, that a shareholder who has had notice of a call is liable to be sued for it, although some other shareholders may not have had notice: it clearly is no decision that a bad notice is good as against anybody. In *Stratford and Moreton Railway Company* v. *Stratton* (2), it was held that calls improperly made could not be enforced even against a defendant who had been a party to the making of the calls and had paid some of them.

[BOVILL, C.J. There, the committee had no power to make the calls as they did. But here the question is whether the notice in

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the company; and any legal proceedings may be continued or commenced against the company by its new name that might have been continued or commenced against the company by its former name."

(1) 2 Ex. 118, 121.

(2) 2 B. & Ad. 518.

point of fact conveyed information to the defendants that the call had been made.] 1868

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Being made in the name of a company which had no legal existence at the time, the call in question was a nullity. To assume a corporate name without proper authority, is an unlawful act: the *Case of Sutton's Hospital* (1); Com. Dig. *Franchises* (F. 9); *Reg.* v. *Registrar of Joint-Stock Companies, in re Sheffield and Rotherham and Chesterfield Insurance Company* (2); *Lawson* v. *Bank of London* (3); *Grant on Corporations*, 50.

April 18. *Powell, Q.C.*, and *Macnamara*, moved on behalf of the defendant, Dangerfield, and in addition to the arguments urged by *Mathews*, contended that Dangerfield was relieved by virtue of the resolution of the 18th of July, 1867, from liability to the call, as he had surrendered his shares. Having made his election at a time when the acceptance of the surrender by the directors would not have exceeded the limit provided by that resolution, the company were bound to accept it, and so exonerate the defendant from further liability in respect of his shares.

BOVILL, C.J. The first question which arises in these two cases is, with reference to the time at which the change in the name of the company took place. The language of the statute is not very clear; but it appears to me that the change is not complete until it has been made upon the register, and a certificate of incorporation altered to meet the circumstances of the case has been issued by the registrar. Until that certificate has been obtained the corporation does not exist by its new name, but is considered as still existing under its original name. I therefore think the plaintiffs were well advised in bringing the actions in their old name of Shackleford, Ford, & Co. The call in question was made by the company, and properly made, in that name. The call, therefore, was a valid call. The only question is whether the notice of call was properly given. The case of *Newry and Enniskillen Railway Company* v. *Edmunds* (4) shews that, in an action for a call, the only question is whether the person sued has had notice of that call, and the fact that other shareholders have

(1) 10 Co. Rep. 28. b.
(2) 10 Q. B. 839.
(3) 18 C. B. 84.
(4) 2 Ex. 118.

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received no notice affords him no defence. With that decision I entirely agree. That disposes of the argument so far as the first objection is concerned. As to persons who had no notice or knowledge of the change of name of the company, it is clear that they would not be bound by a notice given in the name of another company. The matter does not, however, so stand as to either of these defendants. What was the state of their knowledge? On the 18th of July, 1867, a resolution was come to that the name of the company be changed to "The Cheltenham and Swansea Railway Carriage and Wagon Company, Limited." That resolution was duly confirmed at a meeting of the 9th of August. Both defendants were aware of it. The resolution having been so made and confirmed, and the proposed change of name having received the approval of the Board of Trade, all parties connected with the company seem to have thought that all that was necessary had been done. And, when the notice of call was sent out in the new name, nobody doubted the identity of the company. The learned Chief Baron must be assumed to have found, and upon sufficient evidence, that the defendants were aware of the intended change in the name of the company, and that the notice which they received was intended to inform them that a call had been made upon the shareholders in that company. If they knew the fact, I come without hesitation to the conclusion that they had due notice of the call, and that the mistake as to the name was quite immaterial. There is nothing illegal in what has been done, nothing prohibited either by the common law or by statute. That objection therefore fails. The defence on the ground that the shares were surrendered seems to me also to fail. The resolution upon which the defendant Dangerfield relies, is, "that the directors be authorized (*if they shall think fit*) to accept from such shareholders as, having fully paid up the amount due upon the shares held by them, are desirous to retire from the company, a transfer or surrender of their shares." The directors did not think fit to accept a surrender of the defendant's shares. It is said that they had no power to refuse. But it is enough to say that the fourth plea is founded upon an agreement: it is not averred that the directors wrongfully refused to make an agreement. The evidence required to support the plea fails. Upon the whole,

I think the verdicts found by the Lord Chief Baron were right, and that the rules should be refused.

BYLES, J. I am of the same opinion. I think the action was properly brought by the company in its original name. As to the other points, I have nothing to add to what has fallen from my Lord.

KEATING, J. I am of the same opinion. The question is, whether, a call having been duly made by the company known by the name of "Shackleford, Ford, & Company, Limited," a notice in the proposed new name of "The Cheltenham and Swansea Railway Carriage and Wagon Company, Limited," given to a shareholder who was aware of the contemplated change of name, before the company had received a certificate of incorporation in such new name, was a sufficient notice. I agree with my Lord as to the period at which the company might lawfully assume its new name. But I cannot doubt that the notice was sufficient. There is nothing in any statute which requires any particular form of notice. All that is required is, that the shareholders shall have notice. Here they have had notice. The knowledge that a call had been made on the shareholders in the company in which they held shares was conveyed to the defendants. The company were too hasty in assuming their new name; but that did not affect the defendants' knowledge that a call had been made. As to the other point urged by Mr. Powell, viz. that the directors were bound to accept Mr. Dangerfield's surrender, I think that objection is met by the conditional words of the resolution of the 18th of July, 1867, "if they shall think fit." The directors never did think fit.

MONTAGUE SMITH, J. I also am of opinion that both rules should be refused. The action was properly brought by the company in its old name: they were not entitled to use their new name until such new name had been approved by the Board of Trade and entered on the register, and they had obtained a certificate of incorporation accordingly. The 18th section of the 25 & 26 Vict. c. 89, enacts that, "upon the registration of the memorandum of association, and of the articles of association in cases where articles of association are required by the act or by the desire of the parties to be registered, the registrar shall certify under his hand that the company is incorporated, and, in the case

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of a limited company, that the company is limited." It further enacts that "a certificate of the incorporation of any company given by the registrar shall be conclusive evidence that all the requisitions of the act in respect of registration have been complied with." The 13th section, which enables a company to change its name, requires it to be done with the sanction of a special resolution of the company and with the approval of the Board of Trade, and provides that the registrar shall enter the new name on the register in the place of the former name, and shall issue "a certificate of incorporation altered to meet the circumstances of the case." Until so altered and certified, the original certificate remains and is conclusive evidence of the company's incorporation. The plaintiffs, therefore, were well advised in bringing these actions in the old name. The only question which remains is, whether the notice given of the call was sufficient. Now, the call was well made in the original name of the company. Undoubtedly the shareholders were not liable for that call until notice was given to them. The call having been made in the name of "Shackleford, Ford, & Company, Limited," the notice was given in the name which the company intended to adopt, viz. "The Cheltenham and Swansea Railway Carriage and Wagon Company, Limited." It is said that this was not a good notice. There was no illegality in the company's issuing such a notice. They had done what they thought was sufficient to effect the change; but in this they were mistaken. Suppose, although the name of the company had not been legally changed, all the shareholders had agreed that the name should be changed, would not a notice in the altered name suffice? The only question, I apprehend is, whether the notice gives the shareholder to understand that a call has been made and that he is required to pay the amount on a given day. No technicality is prescribed. The defendants perfectly well knew that the call had been made by the plaintiffs. As to the plea in Dangerfield's case, it is enough to say that it was not proved.

Rule refused.

Attorney for Dangerfield: *T. G. Norcutt, for Williams & Brydges, Cheltenham.*

Attorneys for Owen: *Field, Roscoe, & Co., for Bubb & Sons, Cheltenham.*

THE CONSERVATORS OF THE RIVER THAMES *v.* HALL, THE YOUNGER, AND ANOTHER.

1868
May 4.

Statute—Repeal by Implication—Merchant Shipping Act, 1854 (17 & 18 *Vict.* c. 104), *s.* 388—*Thames Conservancy Act*, 1857 (20 & 21 *Vict. c. cxlvii.*), *ss.* 96, 97.

A general enactment in a later statute does not repeal a particular enactment in an earlier statute, unless the intention to do so is manifest, or the implication irresistible.

Section 388 of the Merchant Shipping Act, 1854, enacts that, no owner or master of any ship shall be answerable for any damage occasioned by the fault or incapacity of any qualified pilot acting in charge of such ship within any district where the employment of such pilot is compulsory.

Section 96 of the Thames Conservancy Act, 1857, enacts that the owner of every vessel navigating the Thames shall be answerable for "all trespasses, damages, spoil, or mischief that shall be done by such vessel, or by any of the boatmen *or other persons* belonging to or employed in or about the same, by any means whatsoever, to any of the property or effects of the conservators," &c.; and that the owner of every such vessel shall, for every such trespass, &c., upon conviction before a justice, pay such compensation as shall be fixed by him not exceeding 20*l.*, besides costs; but that, in case the damage shall exceed 20*l.*, the owner may be sued. And s. 97 provides that the boatmen or other person so offending as aforesaid shall be answerable for and shall repay all such damages, &c., to his master or owner:—

Held, that the owner of a vessel navigating the Thames is not responsible for damage done by her to property belonging to the conservators through the fault of a pilot compulsorily in charge of her; for that, though the words of s. 96 of the Thames Conservancy Act are general, they are not to be read as including pilots, and do not by implication repeal the provisions as to pilotage in the Merchant Shipping Act, 1854.

ACTION for the recovery of 120*l.* for damage done in the river Thames to a dredger of the plaintiffs, by a collision between a vessel of the defendants, called the *Galicia*, and the dredger, on the 24th of January, 1867. The following case was stated, under a judge's order, for the opinion of the Court, without pleadings:—

1. The plaintiffs, at the time of the collision were, and are, the conservators of the river Thames, incorporated under the Thames Conservancy Act, 1857, 20 & 21 Vict. c. cxlvii.

2. The defendants at the time of the collision were the owners of a vessel called the *Galicia*, within the meaning of the Thames Conservancy Act, 1857.

3. At the time of the collision the *Galicia* was navigating the

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river Thames, and within the London pilotage district was compulsorily in charge of a licensed pilot, within the meaning of the Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104.

4. At the time of the collision, a dredger, the property of the conservators, within the meaning of the statute, was then lawfully lying moored in the river Thames off Margaretness Point, and was then lawfully employed by the plaintiffs in and about their lawful and necessary business and duties as the conservators of the river Thames.

5. Without any default whatever on the part of the plaintiffs or their servants, or any person or persons having the management of or in any way employed about the dredger, or of the said dredger, the *Galicia*, while being steered and managed by the pilot, and through the fault of the pilot, and of his wrongful orders to the boatmen and other persons belonging to and then employed in and about the defendants' vessel, ran against the dredger of the plaintiffs, and thereby damage was done by the defendants' vessel to the dredger of the plaintiffs, to the amount of 120*l*.

The question for the opinion of the Court was, whether the defendants were liable to the plaintiffs for the damage done by the collision, or whether, the defendants' vessel being compulsorily in charge of a pilot, the defendants were exonerated from liability, by virtue of the provisions of the Merchant Shipping Act, 1854.

Prentice, Q.C. (*W. Frere* with him), for the plaintiffs. The question is whether s. 388 of the Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104, is not, by reason of the inconsistency of the two provisions, impliedly repealed by s. 96 of the Thames Conservancy Act, 1857, 20 & 21 Vict. c. cxlvii. (1)

(1) Section 388 of the Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104, enacts that "no owner or master of any ship shall be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of such ship, within any district where the employment of such pilot is compulsory by law." Section 96 of the Thames Conservancy Act, 1857, 20 & 21 Vict. c. cxlvii, enacts that "the owner of every vessel navigating the river Thames shall be and he is hereby made answerable for all trespasses, damages, spoil, or mischief that shall be done by such vessel, or by any of the boatmen or other persons belonging to or employed in or about the same, by any means whatsoever, to any of the property or

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Under the Thames Conservancy Act, the offender is not liable for *negligence* merely, but for any damage through pure accident or even by a wilful trespass by some person employed on board the vessel,—acts for which the owner would not be liable under ordinary circumstances. The enactment in the Merchant Shipping Act is so well known that it is impossible to conceive that the legislature would not have made some special provision for the case of vessels having licensed pilots on board, if it had been intended that their owners should be relieved from liability. Seeing the numerous duties which are cast upon the conservators for the benefit of the public, and the amount of property at risk in various parts of the river, it is not unreasonable that there should be such a provision for their protection. A precisely similar provision is contained in the Littlehampton Harbour Act, 33 Geo. 3, c. 100, s. 33. It has long been settled that an act of parliament which is inconsistent with a former act impliedly repeals it: Dwarris, 2nd ed. 531. Lord Langdale, M.R., says in *Dean of Ely* v. *Bliss* (1): "If two inconsistent acts be passed at different times, the last is to be obeyed; and, if obedience cannot be observed without derogating from the first, it is the first which must give way." This rule of construction was acted upon by this Court in *Great Central Gas Consumers Company* v. *Clarke* (2), and *Daw* v. *Metropolitan Board of Works.* (3) It may be said that the Thames Conservancy Act is of less force than a general public act of parliament. But that argument was urged without success before the Exchequer Chamber in *Brown* v. *Mayor, &c. of Lon-*

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effects of the conservators, or the banks or other works erected, maintained, or repaired under the provisions of this act; and the owner of every such vessel shall, for every such trespass," &c., so committed as aforesaid, upon conviction before a justice, pay to the secretary of the conservators such damages, satisfaction, and compensation as shall be fixed by the justice, together with costs, not exceeding 20*l.* besides costs; but, in case such damage shall exceed 20*l.*, the owner may be sued by the conservators for such damages, satisfaction, or compensation: and s. 97 provides that every such boatman or other person so offending as last aforesaid shall be answerable for and shall repay all such damages, &c., so to be ascertained and fixed as aforesaid, to his master or owner.

(1) 5 Beav. 574, 582.

(2) 11 C. B. (N.S.) 814; in error, 13 C. B. (N.S.) 838; 32 L. J. (C.P.) 41.

(3) 12 C. B. (N.S.) 161; 31 L. J. (C. P.) 223.

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don (1), where Cockburn, C.J., said: "Although it may be that some private acts of parliament amount to no more, or little more, than private agreements between the parties at whose instance they are passed, we think that cannot be said of an act of parliament such as the present, which deals with public rights and matters of great public interest. An act of parliament, the subject-matter of which is the conservancy of the river Thames, and the tolls chargeable upon the public for the navigation thereof, and moreover which materially affects the prerogative and rights of the Crown, can hardly be looked upon as a private agreement." The words "other person," in s. 96, are large enough to include pilots.

Sir G. Honyman, Q.C. (*Watkin Williams* with him), contrà. The question is purely one of intention. Did the legislature, when passing the Thames Conservancy Act, 1857, mean to repeal the clauses as to compulsory pilotage in the Merchant Shipping Act, 1854? There can be no sound reason why the conservators of the Thames should be placed in a position different from the rest of the public. In Maude and Pollock's Law of Merchant Shipping, 2nd ed. 198, after adverting to the statutory provisions and the cases on the subject, it is said, that, "Independently of legislative provision, the courts of law have always considered, as indeed justice seemed to require, that wherever the employment of a pilot was compulsory, the owners and master were not liable for injuries arising from his acts: for, in these cases, it was deemed that their authority was superseded by legislative enactment, and that it would be unjust to hold them responsible for the skill, sobriety, and caution of one whom they had not selected, and over whom they had in fact little or no control." (2) The legislature, when dealing with the subject of pilotage in the Merchant Shipping Acts Amendment Act, 1862, 25 & 26 Vict. c. 63, ss. 39—42, which act is by s. 1 "to be construed with and as part of the Merchant Shipping Act, 1854" (3), refer to the enactments as to pilotage in the act of 1854 as subsisting enactments. They do not seem to have been aware of this extraordinary provision in the Thames Conservancy Act. In *Fitzgerald*

(1) 13 C. B. (N.S.) 828; 31 L. J. (C. P.) 280.

(2) And see Maclachlan on Shipping, 256 et seq.

(3) See the note in p. 1 of the Supplement to Maclachlan on Shipping.

v. *Champneys* (1), Page Wood, V.C., referring to *Birkenhead Docks* v. *Laird* (2), and to the acts relating to the Marlborough, Wellington, and Shrewsbury entails, adopts the maxim Generalia specialibus non derogant, and holds that a special provision in an act of parliament directed to a particular object, is not repealed by a subsequent general enactment which does not specifically refer to the former. It would require strong words to warrant the construction contended for by the plaintiffs. Suppose the vessel were mortgaged, or under charter, is the owner to be made liable for every act or default of the mortgagee or the charterer or those employed by them? The 97th section shews that the legislature did not intend to cast upon the owner a liability for all acts of the pilots; but only for the acts of their own servants, against whom it gives them a remedy over.

Prentice, Q.C., was heard in reply.

BYLES, J. I am of opinion that the defendants are entitled to the judgment of the Court. In the first place, s. 388 of the Merchant Shipping Act, 1854, is express, that "no owner or master of any ship shall be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of such ship within any district where the employment of such pilot is compulsory by law." This is an enactment which embraces a very large portion of the river Thames, and therefore the question raised in this case is one of great importance. There is no express repeal of that provision by the Thames Conservancy Act, 1857: but we are asked to imply a repeal of it. The Court must be satisfied that the two enactments are inconsistent before they can from the language of the later imply a repeal of an express prior enactment. It seems to me that, although the language of the 96th and 97th sections of the Thames Conservancy Act, 1857, is somewhat inaccurate, we may, without doing violence to it, hold it not to be inconsistent with the enactment in the former act, but that both may well be read together. I should be slow in coming to the conclusion that the owner is to be held liable for damage done by his vessel without any default either on his part or on that of any boatman or other

(1) 2 J. & H. 31, 53, 54. (2) 4 De G. M. & G. 732.

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person employed by him. If it were necessary to put a strict construction upon the words of the 96th section, perhaps Mr. Prentice's contention might prevail. But it is plain from the 97th section that the 96th section only applies where the persons who do the damage are persons offending; for, the words are, "provided always that every such boatman or other person so offending as last aforesaid," &c. Now, who are the parties who offend against the 96th section? The first part of the clause may be read as if the owner himself were navigating the vessel,—"The owner of every vessel navigating the river Thames shall be and he is hereby made answerable for all trespasses, damages, spoil, or mischief done by such vessel." Then comes the case of his servants,—"or by any of the boatmen or other persons belonging to or employed in or about the same." I admit that the preposition "by" is not used there: but the persons who are supposed to offend, and against whose master compensation for the damage done may be awarded, are, by s. 97, if the master is made to pay, to repay to him all such damages so ascertained and recovered as aforesaid; which evidently shews that "the boatmen or other persons belonging to or employed in or about the same," means "belonging to *the vessel* and employed *by the owner* in or about the same." Now, that cannot be said of the pilot. Pilots are appointed or employed by a superior power; and even the selection of a particular member of the body is not permitted to the master or owner. Independently, therefore, of any other consideration, I should have thought the true construction of the 96th and 97th sections of the Thames Conservancy Act to be what I have described. But, when we are asked to construe them as impliedly repealing a prior distinct enactment, I cannot entertain a doubt.

KEATING, J. I am of the same opinion. The enactment in the Merchant Shipping Act, 1854, is clear and positive, and is founded upon the simplest principles of justice. A ship-owner who is compelled by law to take on board a pilot, and that without a right of choice, ought not to be held answerable for the neglects or defaults of that person. It is said that the 388th section of that act is impliedly repealed by the 96th section of the Thames Conservancy Act, 1857. I entirely agree with my Brother Byles,

that, before we come to that conclusion, we are bound to satisfy ourselves that it is a necessary implication. I cannot see any such necessary implication. It seems to me that the object of the 96th section simply is, that, where a boatman or other subordinate person engaged in navigating a vessel is guilty of any trespass upon or does any injury to the property of the conservators, the latter shall not be put to look for their remedy against him, but may resort to the owner; the owner having by s. 97 a remedy over against the offender for the penalty or compensation and costs. But the obligation of the owner is made correlative with his remedy over. It evidently contemplates the relation of master and servant or employer and employed; a relation which does not exist between the owner of a vessel and the pilot put on board to navigate her. It seems to me, therefore, that there is no such inconsistency between the two enactments as to warrant us in holding the former to be impliedly repealed by the latter. The defendants are entitled to judgment.

MONTAGUE SMITH, J. I am entirely of the same opinion. Section 388 of the Merchant Shipping Act, 1854, contains a special legislation exempting the owners of vessels from liability for injuries resulting from the acts or defaults of the pilot whom he is bound to take on board, without any power of selection. That being a special legislation on the subject, even if the language of the 96th section of the Thames Conservancy Act, 1857, were large enough to include pilots, I should have thought the special enactment was not affected by it. The rule, as laid down by Sir Orlando Bridgman (1), is, that "the law will not allow the exposition to revoke or alter by construction of general words, any particular statute, where the words may have their proper operation without it." The Thames Conservancy Act is general so far as it relates to the river Thames. The words of s. 96 are general and affirmative, and may well stand with the previous special legislation. I agree with the rest of the Court, that the words of the 96th section are not to be read as including pilots, when it speaks of boatmen or *other persons* belonging to or employed in or about the vessel. The generality of those words must be limited to the reason and

(1) *Lyn* v. *Wyn*, Bridgman's Judgments, 122, 127.

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necessity of the case. They cannot mean all damage or mischief done by the vessel under any circumstances; but must be limited to damage done by the boatmen or other persons employed by the owner on board the vessel. They undoubtedly are so limited where the damage does not exceed 20*l.*: and we cannot suppose that a different liability was intended to be imposed where the damage is greater, though the remedy given is different. Upon the whole it seems to me that a pilot does not come within the words of the 96th section of the Thames Conservancy Act, and that that section does not by implication repeal the 388th section of the Merchant Shipping Act, 1854. On both grounds, therefore, I think the defendants are entitled to judgment.

Judgment for the defendants.

Attorney for plaintiffs: *W. C. Hall, for Frere & Co.*
Attorneys for defendants: *Thomas & Hollams.*

April 18.

WHATMAN *v.* PEARSON.

Master and Servant—Negligence—Liability of Master—Scope of Employment—Notice of Action under the Metropolitan Management Amendment Act, 1862 (25 & 26 *Vict. c.* 102), *s.* 106.

4 QB 479
8 CB(NS) 568, 7
37 & 38
2 QBD 281,
6 QBD 319

The defendant, a contractor under a district board, was engaged in constructing a sewer, and employed men with horses and carts. The men so employed were allowed an hour for dinner, but were not permitted to go home to dine or to leave their horses and carts. One of the men went home about a quarter of a mile out of the direct line of his work to his dinner, and left his horse unattended in the street before his door. The horse ran away and damaged certain railings belonging to the plaintiff:—

Held, that it was properly left to the jury to say whether the driver was acting within the scope of his employment, and that they were justified in finding that he was.

Held, also, that the thing complained of was not a thing done or intended to be done under the powers of the board, or under the act, so as to entitle the defendant to a notice of action under s. 106 of the 25 & 26 Vict. c. 102.

DECLARATION for damage done to certain iron railings of the plaintiff by the negligence of the defendant's servant in the management of a horse and cart of the defendant.

Plea, not guilty, by statute 25 & 26 Vict. c. 102.

The cause was tried before Byles, J., at the last sittings at Guildhall. The plaintiff was the owner of some houses at Deptford. The defendant, a contractor, was employed under the district board of Greenwich in carting away the soil excavated from a highway there during the construction of a sewer, and for this purpose employed a number of men with horses and carts. The duty of the men so engaged, was, to travel with their carts for a certain number of hours each day between the place where the excavation was going on and the place of deposit for the earth and rubbish, with an hour's interval for dinner, but never to quit their horses or carts or to leave their work. One of the men, contrary to his instructions, went home to dinner at a place about a quarter of a mile out of the line of his work, and left his horse and cart in the street before his house; the horse had his bridle off and a nose-bag on, and there was no one to look after him. Whilst the driver was thus absent, the horse ran away, and damaged the plaintiff's railings. No notice of action was given.

The learned judge left it to the jury to say whether the driver had been guilty of negligence, whether he was at the time acting within the scope of his employment, and whether the injury complained of was a thing done or intended to be done under the act (25 & 26 Vict. c. 102, s. 106), under which the contractor's work was being done. The jury answered the first two questions in the affirmative and the third in the negative.

The learned judge reserved leave to the defendant to move to enter a nonsuit, on the ground that there was no evidence that the driver was acting in the scope of his employment, or on the ground that the defendant was entitled to notice of action under 25 & 26 Vict. c. 102, s. 106.

Montagu Chambers, Q.C., moved to enter a nonsuit, or for a new trial on the ground of misdirection. That the carman was guilty of negligence there is no doubt. The first question will be whether he was at the time acting within the scope of his employment. The distinctions in some of the cases are extremely fine. In *Croft* v. *Allison* (1), it was held that, where the defendant's

(1) 4 B. & A. 590.

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servant wantonly, and not in the execution of his master's orders, struck the plaintiff's horses and thereby produced an accident, the master was not liable; but that, where he so struck them in the course of his employment, although injudiciously, the master would be responsible. The rule is well stated by Maule, J., in *Mitchell* v. *Crassweller*. (1) Here, the carman's duty was defined; he had no pretence for driving the horse and cart out of the line of his work. At all events, as the defendant was acting as a contractor under the vestry of Greenwich, he falls within the description of persons entitled to a notice of action under the 25 & 26 Vict. c. 102, s. 106. (2) In *Hardwick* v. *Moss* (3), the defendants were held to be entitled to a notice of action under the Highway Act, 5 & 6 Wm. 4, c. 50, s. 109, even though they might not have been acting strictly within the line of their duty, if they had reasonable ground for supposing they were acting under the authority of the act of parliament. The learned judge left it to the jury to say whether the knocking down of the plaintiff's railings was an act done under the powers of the board. That clearly was not a correct mode of putting it; nor was it properly a question for the jury at all.

BOVILL, C.J. I am of opinion that there should be no rule upon either ground. As to the first point, the jury found that the defendant's servant was acting in the course of his employment; and I think there was sufficient evidence to support that finding. In *Joel* v. *Morison* (4), Parke, B., lays it down that "the master is only liable where the servant is acting in the course of his employment." But he adds: "If he was going out of his way against his master's implied commands, when driving on his master's business, he will make his master liable." In the present

(1) 13 C. B. 237, 246.

(2) Which enacts that "No writ or process shall be sued out against or served upon, and no proceeding shall be instituted against the metropolitan board of works, or any vestry or district board, or their clerk, or any clerks, surveyor, contractor, officer, or person whomsoever acting under their or any of their directions, for anything done or intended to be done under the powers of such board or vestry under the said act [19 & 20 Vict. c. 120] or this act, until the expiration of one calendar month next after notice in writing shall have been served upon such board or vestry," &c.

(3) 7 H. & N. 136; 31 L.J. (Ex.) 205.

(4) 6 C. & P. 501, 503.

case, the servant had charge of the horse and cart, and it was through his negligence and want of care, whilst acting in the course of his employment, that the accident occurred. The jury were quite at liberty to come to the conclusion they did; and I cannot doubt its accuracy. As to the notice of action,—it is difficult to see how such a case can be brought within the 106th section. The intention was that there should be notice in all cases where the act complained of was a thing done or intended to be done under the powers of the board or vestry or under the act. The cause of action here is not a thing done or intended to be done under the act; the whole thing was collateral. The defendant's servant was not acting or intending to act in the performance of any duty cast upon his master by virtue of the act. He was guilty of negligence in the care of the horse entrusted to him, whilst he was absent taking his meal. That clearly had no relation to an act done or intended to be done under the act of parliament. Neither the act done nor the mischief which resulted had anything to do with the performance of the powers of the act. No notice of action, therefore, was necessary.

BYLES, J. I am of the same opinion. The question of negligence was left to the jury; and they found that the defendant had been guilty of negligence. I agree it is doubtful whether the second and third questions ought not to have been decided by the judge; but for safety sake I left them to the jury. When the defendant's servant left the horse at his own door without any person in charge of it, he was clearly acting within the general scope of his authority to conduct the horse and cart during the day. On the second point, I am of opinion that the thing complained of was not an act done or a default made under the powers of the board, or under the act. If negligence in looking after the horse was the cause of the injury, that clearly had nothing to do with the powers of the board; still less had the breaking of the plaintiff's railings.

KEATING, J. I am of the same opinion. Upon the first point Mr. Chambers's contention in substance is, that there was such an amount of deviation by the defendant's servant from the line of

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his duty, that he ceased to be acting in the course of the employment of his master. It is always, however, a question of degree. I think my Brother Byles was quite right in leaving the question to the jury. They found, and properly, I think, that the man was at the time of the accident acting in the course of his employment. As to the want of notice,—I see no ground for saying that the defendant's servant was acting or intending to act in pursuance of the act of parliament when he was guilty of the negligence complained of. Whether that be a question for the jury or for the Court, I am equally of opinion that the verdict was right.

MONTAGUE SMITH, J. I am of the same opinion. There was evidence that the defendant's servant was acting within the scope of his authority, and not upon his own account independently of his master; and that evidence was properly submitted to the jury. Upon the other point, there was no evidence to satisfy the jury, or which ought in my judgment to satisfy us, that a notice of action was necessary. The injury sustained by the plaintiff did not arise from any negligence in the performance of anything done or intended to be done under the powers of the act. It is not because a man may believe that he is acting in pursuance of the act that a notice of action is necessary. The negligence of the defendant's servant here was entirely collateral to anything done or intended to be done under the powers conferred by the act. It would be difficult to say where the necessity for a notice of action would not arise, if it were held to be necessary here. If the servant were taking the horse out of the shafts, and in so doing negligently suffered it to run away and do damage, could it be said that that was a case within the act? It seems to me that it would be an absurd construction of the clause to hold a case like this to be within it.

Rule refused.

Attorney for defendant: *John Thomas Moss.*

SPENCE AND ANOTHER *v.* THE UNION MARINE INSURANCE COMPANY, LIMITED.

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April 18.

Ship and Shipping—Marine Insurance—Total or Partial Loss—Obliteration of Marks by Sea Perils—Goods insured not distinguishable from other similar Goods on Board—Confusio—Commixtio.

Cotton belonging to different owners was shipped in bales specifically marked, at Mobile for Liverpool: 43 bales belonged to the plaintiffs, and were insured by the defendants against the usual perils. In the course of her voyage the ship was wrecked near Key West; all the cotton was more or less damaged; some of it was lost, and some was so damaged that it had to be sold at Key West. The rest of the cotton was conveyed in another vessel to Liverpool. The marks on a very large number of the bales were so obliterated by sea-water that none of the cotton lost or sold at Key West, and a portion only of that carried to Liverpool, could be identified as belonging to any particular consignee. Two only of the plaintiffs' 43 bales were identified, and these were delivered to the plaintiffs:—

Held, that in respect of the cotton lost, and that sold at Key West, there was a total loss of a part of each owner's cotton, and that all the owners became tenants in common of the cotton which arrived at Liverpool, and could not be identified; the share of each owner's loss in the cotton totally lost or sold at Key West, and his share in the remainder which arrived at Liverpool being in the proportion that the quantity shipped by him bore to the whole quantity shipped according to the rule in cases of general average where it is not known whose goods are sacrificed: and, consequently, that there was no total loss, either actual or constructive, of the plaintiffs' 41 bales.

DECLARATION on a policy of marine insurance, averring a total loss.

Pleas: 1. Payment into court of 122*l*. 2. Except as to 122*l*., payment before action.

The plaintiffs took the 122*l*. out of court, and joined issue on the second plea.

The cause was tried before Shee, J., at the Liverpool summer assizes, 1867. The facts were as follows: The plaintiffs are merchants at Liverpool. The defendants are a marine insurance company also carrying on business at Liverpool. The action was brought to recover a total or salvage loss on a policy of insurance at and from Mobile to Liverpool, on forty-three bales of cotton, marked and numbered as therein mentioned, in the ship called the *Caroline Nasmyth*.

The defendants paid the plaintiffs before action 1150*l*., being 50 per cent. on the policy.

On the 10th of October, 1865, the *Caroline Nasmyth* sailed from Mobile with a cargo of cotton consisting of 2493 bales belonging to

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various owners, and shipped under separate bills of lading; 532 bales (including the 43 for the loss of which the action was brought) belonged to the plaintiffs, who effected insurances with the defendants thereon under six different policies, one of which was the policy sued upon. The vessel on the 23rd of October, 1865, after having been at sea thirteen days, took the ground on the Florida reef, about eighty miles from Key West, and became a total wreck. The cargo was landed at Key West, all more or less damaged, and many of the bales broken, the marks and numbers on others entirely obliterated. Some bales were lost, and some were so damaged that they had to be sold at Key West. The remainder of the cotton was forwarded to Liverpool in a vessel chartered by the master at Key West.

Of the 2493 bales which were on board the *Caroline Nasmyth* when she sailed on her voyage, 617 bales arrived in Liverpool in such a state that they could be identified, and they were delivered to the different consignees, but more or less damaged; 1645 bales were sold at Liverpool, the marks being so obliterated by sea-water that they could not be identified as belonging to any particular consignee, and 231 bales were either lost on the reef or sold at Key West. Of the plaintiffs' 43 bales, two only (of the value of 59*l.* 12*s.* 11*d.*) could be identified at Liverpool, and these were delivered to the plaintiffs.

Due notice of the abandonment of the 41 bales had been given by the plaintiffs.

Subject to a question as to the correctness of the calculation, the underwriters had paid the plaintiffs their share (in the proportion of 43 to 2493) on the value of the cotton which was actually lost, and also (under an arrangement which was made for the sale of the cotton without prejudice to the rights of the parties) in the same proportion for the damage to the cotton which arrived at Liverpool but could not be identified.

It was contended on the part of the plaintiffs, that, as no one of their remaining 41 bales arrived in Liverpool in such a state that it could be identified, they were entitled to treat the loss as a total loss with benefit of salvage. It was conceded that, if it were an average loss only, the 122*l.* paid into court, plus the sum paid before action, would cover the plaintiffs' claim.

The defendants contended that they were entitled to assume that, of the plaintiffs' remaining 41 bales, part were among those lost at Key West and part amongst those which arrived at Liverpool; and that, upon that assumption, the loss would be an average loss, and covered by the payment into court.

A verdict was entered for the plaintiffs for 460*l.*, subject to leave reserved to the defendants to move to enter the verdict for them.

E. James, Q.C., in Easter Term, accordingly obtained a rule nisi to enter a verdict for the defendants or a nonsuit.

Brett, Q.C., *Quain, Q.C.*, and *R. G. Williams*, shewed cause. This was a total loss of the 41 bales, with benefit of salvage, and not an average loss. The contract of the underwriter on goods is, that they shall arrive at the port of destination in such a state that they shall not by a peril of the sea be prevented from being delivered to the assured. His undertaking is not satisfied by the mere fact of arrival at the port of destination; as, for instance, if brought there by a captor. In *Roux* v. *Salvador* (1), Lord Abinger says: "The loss is in its nature total to him who has no means of recovering his goods, whether his inability arises from their annihilation or from any other insuperable obstacle." The loss, therefore, is total, where there is an insuperable obstacle to the delivery of the goods to the assured, and that insuperable obstacle arises from a peril of the sea. As 231 bales of cotton were totally lost at Key West, it may be (and that is enough for the argument) that the whole of the plaintiffs' 41 bales were amongst those so lost. The consignee goes to the captain with his bill of lading, and demands his goods. By reason of a sea peril, the captain is unable to deliver them. How can that be other than a total loss? Is the assured bound to receive the goods of some one else, or money instead, because by a peril of the sea they have become undistinguishable from his own goods? There is nothing in our law to warrant that. It would be impossible in such a case to adjust an average loss, because impossible to ascertain what the goods of the assured sold for. Are the several owners of goods which have thus been mixed to be treated as tenants in common of the mass?

(1) 3 Bing. N. C. 266, 279.

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[WILLES, J. In *Buckley* v. *Gross* (1), where tallow in a warehouse which was burnt down melted and flowed into a common sewer, and was recovered and appropriated by the defendant, Blackburn, J., says: "The tallow of the different owners was indeed mixed up into a molten mass, so that it might be difficult to apportion it among them; but I dissent from the doctrine that because the property of different persons is confused together, that entitles a third party to steal it with impunity. Probably the legal effect of such a mixture would be, to make the owners tenants in common in equal portions of the mass; but, at all events, they do not lose their property in it."]

The assured is entitled to demand the specific goods which he insured. The contract of the insurer is not satisfied by the tender of an equivalent. The loss is total where the thing insured "is wholly lost to the owner *as the thing it was formerly*," 2 Parsons on Mercantile Law, 335. The same may be gathered from the definition of a total loss in Phillips on Insurance, s. 1600.

In the New York Civil Code, art. 1477, it is said: "An actual total loss is caused by,—1. A total destruction of the thing insured,—2. The loss of the thing by sinking or by being broken up,—3. Any damage to the thing which renders it valueless to the owner for the purposes for which he held it; or,—4. Any other event which entirely deprives the owner of the possession, at the port of destination, of the thing insured." The present case falls within the latter definition.

There is no direct authority upon the subject to be found in our law. In *De Peyster* v. *Sun Mutual Insurance Company* (2), where the question arose as to memorandum articles, Grover, J., says: "The precise point involved in this case remains unsettled by judicial authority in this State. The English rule makes the insurer responsible, when it becomes impossible from any of the perils covered by the policy to transport the property to its port of destination: *Roux* v. *Salvador*. (3) The same doctrine is held by the supreme court of the United States: *Hugg* v. *Augusta Insurance Company* (4); also by the supreme court of Maine:

(1) 3 B. & S. 566, 574; 32 L. J. (Q.B.) 129.
(2) 5 Smith's N. Y. App. Cas. 272
(3) 3 Bing. N. C. 266.
(4) 7 How. U. S. R. 595.

Williams v. *Kennebeck Insurance Company.* (1) The principle of the above cases I think sound."

[BOVILL, C.J. Suppose two merchants ship oil, of different kinds and of different value, on board the same ship, and by perils of the sea, the casks leak and the contents become mixed in the ship's hold, and the oil is afterwards pumped out of the hold and the casks refilled. What would be the effect of this accidental confusion ?]

The effect, as between the assurer and the assured, would be, that, as the latter could not get the thing he insured, the loss would be total, probably with benefit of salvage. A buyer could not be compelled to accept the mixed article. In *Montoya* v. *London Assurance Company* (2), a vessel laden with hides and tobacco in the course of her voyage shipped large quantities of sea-water: on the termination of the voyage it was discovered that the sea-water had rendered the hides putrid, and that the putrefaction of the hides had imparted an ill-flavour to the tobacco, and had thereby injured it: and it was held that this was a loss by perils of the sea, which the insurers must make good.

Whatever may be the effect of mixture as to the question of property, it can have none upon the contract of insurance. A man's property cannot be changed, except by his consent. The Roman law distinguishes between commixtio, the blending together of dry goods, and confusio, the mingling of liquids: Just. Inst. by Sandars, lib. ii. tit. 1, ss. 27, 28; Mackeldey, Jur. Rom. §§ 251, 252: but whether the owners became tenants in common of the mixture depended upon whether or not the mixing was by consent.

[WILLES, J. Mackeldey treats the distinction between commixtio and confusio as modern, and a mere distinction of words. Note to § 251.

BOVILL, C.J., referred to *Stock* v. *Stock* (3), *Ward* v. *Ayre* (4), 2 Steph. Com. 4th ed. 24, and to *Lupton* v. *White.* (5) Is there any case to be found of accidental mixture?]

There is some reference to it in Story on Bailments, 6th ed.

(1) 31 Maine R. 455.
(2) 6 Ex. 451; 20 L. J. (Ex.) 254.
(3) Poph. 38.
(4) Cro. Jac. 366; 2 Bulstr. 323.
(5) 15 Ves. 442.

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s. 40, but there is no reported case. The doctrine of the civil law as to commixtio by accident is adopted in several of the continental codes: see Code Napoleon, Civile, art. 573; see also the codes of Holland, of Austria, and of Bavaria. No such rule, however, has been engrafted upon our law. This can only be adjusted as a total loss with benefit of salvage; there being no data upon which an average loss could be calculated: see the judgment of Dallas, C.J., in *Hardy* v. *Innes* (1), and *Inchbald* v. *Western Neilgherry Coffee, &c. Company.* (2)

As to notice of abandonment (upon which the Court pronounced no opinion), the following authorities were referred to:—Phillips on Insurance, s. 1524; 2 Arnould on Insurance, 3rd ed. 963; *Anderson* v. *Royal Exchange Insurance Company* (3); *Naylor* v. *Taylor* (4); and the judgment of Lord Campbell, C.J., in *Lozano* v. *Janson.* (5)

Cohen and *C. Russell* (*Mellish, Q.C.*, with them). If all the bales had arrived at Liverpool with their marks obliterated, there clearly would have been no total loss; for, the underwriters do not insure against the loss of marks. How, then, can the fact of some of the bales having arrived with the marks unobliterated convert an average into a total loss? The contention on the part of the plaintiffs is, that the loss was total because they have been prevented from obtaining possession of their goods at the port of destination. But the plaintiffs have not been prevented from obtaining their goods at the port of destination. The contract of the underwriter is only that the goods shall be landed safely, or that, if they are damaged, he will pay for the damage upon the principle laid down by Lord Mansfield in *Lewis* v. *Rucker* (6), viz. the loss which the assured has actually sustained, apart from any rise or fall in the market, or any contracts which the assured has made with purchasers. In no case can the assured recover as for a total loss, where the goods have arrived in specie: *Brown* v. *Carstairs* (7); *Macarthy* v. *Abel* (8); *Benson* v. *Chapman* (9);

(1) 6 J. B. Moore, 574, 578.
(2) 17 C. B. (N.S.) 733; 34 L. J. (C.P.) 15.
(3) 7 East, 38.
(4) 9 B. & C. 718.
(5) 2 E. & E. 160; 28 L. J. (Q.B.) 337.
(6) 2 Burr. 1167.
(7) 3 Campb. 161.
(8) 5 East, 388.
(9) 2 H. L. 696.

Scottish Marine Insurance Company v. *Turner* (1); *Neilson* v. *Columbian Insurance Company.* (2) In *De Peyster* v. *Sun Mutual Insurance Company* (3), as appears from the end of the judgment referred to, it was found that the arrival of any of the property insured at New York was rendered impossible by the perils covered by the policy.

These goods were not lost proximately by perils of the sea. In *Green* v. *Elmslie* (4) it was held that, if a ship be driven by stress of weather on an enemy's coast, and there captured, it is a loss by capture, and not by perils of the sea. *Ionides* v. *Universal Marine Insurance Company* (5) is a strong authority to the same effect. There, a vessel was wrecked on the coast of North Carolina, in consequence of the captain having mistaken his course by reason of the light at Cape Hatteras having been extinguished by hostile troops. In giving judgment, Erle, C.J., says (6): "The maxim causa proxima non remota spectatur, is peculiarly applicable to insurance law. The loss must be immediately connected with the supposed cause of it. Now, the relation of cause and effect is matter which cannot always be actually [accurately ?] ascertained: but, if, in the ordinary course of events, a certain result usually follows from a given cause, the immediate relation of the one to the other may be considered to be established."

[WILLES, J., referred to *Bondrett* v. *Hentigg.* (7)]

In *Tatham* v. *Hodgson* (8), upon an insurance on slaves against perils of the sea, their death by failure of sufficient and suitable provision occasioned by extraordinary delay in the voyage, from bad weather, was held not to be a loss within the policy. Here, the perils of the sea would not have caused the particular loss, but for the accident of other similar cargo being on board and belonging to different persons.

The case of *Montoya* v. *London Assurance Company* (9), which is the only one that presses against the defendants, underwent considerable criticism in *Thompson* v. *Hopper.* (10) Willes, J.,

(1) 1 Macq. 334.
(2) 3 Caines, 108.
(3) 5 Smith's N. Y. App. Cas. 272.
(4) Peake, 278.
(5) 14 C. B. (N.S.) 259; 32 L. J. (C. P.) 170.
(6) 14 C. B. (N.S.) 285.
(7) Holt, N. P. C. 149.
(8) 6 T. R. 656.
(9) 6 Exch. 451; 20 L. J. (Ex.) 254.
(10) E. B. & E. 1038; 27 L. J. (Q.B.) 441.

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says (1): "The real question there was, as is explained by Parke, B., what was the proximate cause of the loss in that particular case." And Bramwell, B., adds (2): "The loss to my mind was by a peril of the sea as much as though the tobacco had rotted. Its physical properties and the action of the sea, as the tobacco was circumstanced, injured it, and so the Court say. Baron Parke, p. 459, is express that the loss 'is immediately and directly caused by perils of the sea.'" Thus explained, that case does not conflict with the present argument. The loss, if any, here is, a loss by reason of the failure of some evidence to prove the identity of the bales. How is such a loss as that covered by this policy?

As the plaintiffs claim for a total loss, the onus probandi lies on them: they cannot recover unless they shew a total loss. Here, more than 41 bales were landed at Liverpool. How are the plaintiffs to shew that the bales tendered to them were not their bales?

Further, the plaintiffs have not been deprived of the power of obtaining their goods, or some portion of them. Notwithstanding what has happened, either the several owners of the undistinguishable bales have become owners in common, or the original ownership remains: see the judgment of Blackburn, J., in *Buckley* v. *Gross*. (3) The position of joint-owners of a chattel is well explained by Cresswell, J., in *Mayhew* v. *Herrick*. (4) There was nothing to prevent the plaintiffs from taking their 43 bales, assuming all arrived; they would have subjected themselves to no action.

With regard to the confusion of goods, the foreign jurists are by no means agreed; and the doctrine of the civil law has not invariably been adopted. Casaregis, disc. 1, s. 104, p. 7. In Meredith's Emeregon, p. 245, where this passage is referred to, the Institutes, lib. ii. tit. 1, ss. 27, 28, as to commixtio and confusio, are referred to as applicable. The subject is also treated of in Bowyer's Commentaries on the Modern Civil Law, pp. 88, 89. Pothier, Traité du Droit de Domaine de Propriété, Part 1, ch. ii.

(1) E. B. & E. at p. 1048; 27 L. J. (Q.B.) at p. 445.

(2) E. B. & E. at p. 1046; 27 L. J. (Q.B.) at p. 444.

(3) 3 B. & S. 566; 32 L. J. (Q.B.) 129.

(4) 7 C. B. 229.

s. 3, art. 4, s. 2 "De la Confusion," ed. 1846, p. 167, does not agree with Mackeldey on the Roman law, but thinks that by the confusion the parties become owners in common. And in 2 Kent's Commentaries, 10th ed. 465, it is laid down that, "With respect to the case of a *confusion* of goods, where those of two persons are so intermixed that they can no longer be distinguished, each of them has an equal interest in the subject as tenants in common, if the intermixture was by consent. But, if it was wilfully made without mutual consent, then the civil law gave the whole to him who made the intermixture, and compelled him to make satisfaction in damages to the other party for what he had lost. The common law gave the entire property, without any account, to him whose property was originally invaded, and its distinct character destroyed." And see the judgment of Lord Abinger, C.B., in *Jones* v. *Moore*. (1)

Cur. adv. vult.

April 18. The judgment of the Court (Bovill, C.J., Willes, Keating, and Montague Smith, JJ.) was delivered by

BOVILL, C.J. This case was argued before us last Term, with great learning and ability on both sides; and we are much indebted to the learned counsel for the assistance they have rendered to the Court.

The plaintiffs claimed to recover against the defendants as for a total loss of forty-one bales of cotton. The defendants paid a sum of money into court upon the principle of there having been a total loss of a small portion of the cotton and a partial loss only of the remainder, according to a calculation of the proportion that would be applicable to the plaintiffs' cotton with reference to the 231 bales which were actually lost, and the 1645 bales which arrived, but without any marks or the means of distinguishing the respective owners to whom those bales belonged. The principal question in the case was, whether there was a total loss of the whole of the plaintiffs' forty-one bales which were not delivered.

The ground upon which the plaintiffs contended for such a total loss was, that the whole forty-one bales must be considered as included in the 231 bales, or that, by the perils of the seas, the

(1) 4 Y. & C. 351, 356.

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marks on the plaintiffs' bales, as well as upon other bales of cotton in the same ship and which reached this country, had become obliterated, so that it was impossible to distinguish one person's cotton from that of another, and therefore impossible for the plaintiffs to obtain the identical bales which they had insured.

Subject to a subordinate question as to the correctness of the calculation, the plaintiffs had been paid their proportion of the cotton that was actually lost, and had been offered what would be their proportion of the cotton which was saved, or, rather, its equivalent in money was paid to them under the arrangement that was made for sale of the cotton without prejudice to the rights of the parties; but, the price of cotton having fallen very materially in the market, the plaintiffs endeavoured to treat the obliteration of the marks, and the consequent impossibility of identifying any of the bales except the two which were delivered to them, as a total loss, and contended that, as the impossibility of the ship-owner delivering to them their identical bales of cotton had been caused by the perils of the seas, it was a total loss, either actual or constructive, within the meaning of the policy.

It is manifest that the plaintiffs' argument would equally apply if not a single bale of cotton had been lost or damaged out of the whole cargo, and if the marks only had been obliterated from this and other cotton by the same vessel; and it would lead to the strange anomaly that, although all the goods which had been put on board arrived safely at their destination, there would, according to the plaintiffs' contention, be a total loss, for the purpose of insurance law, of the whole of them. Indeed, in every case of the accidental confusion of goods on board a ship, so that they could not be identified, where it arose from the perils of the seas, if the principle contended for by the plaintiffs be correct, it might be said that the ship-owner was absolved from any liability to deliver the goods, and this strange conclusion would also follow, that, if the cargo all belonged to one owner, it might be said to be entirely safe and uninjured, under circumstances in which, if there were two owners, however small the proportion of one of them, it must be said to be totally lost; so that, if one shipper owned ninety-nine bales, and another, one, of the same description, and by reason of the stranding of the vessel all were transhipped with the

loss of the marks, after which the cargo arrived safe, each owner would have wholly lost all he had, because neither could affirm as to any given bale that it belonged to him. Practically, in such a case, the owner of the one bale would receive one of the bales, either by delivery of the ship-owner or by agreement, and probably be content, and this ought to operate as a partition, so as to vest the residue in the owner of the larger share.

We must, thus, necessarily consider what is the effect of the obliteration of marks upon various goods of the same description which are shipped in one vessel, and which without any fault of the owners become so mixed that one part is undistinguishable from another; and it seems to us not altogether immaterial to inquire in whom the property in the goods is vested under such circumstances, or whether they become bona vacantia, and pass to the first finder or to the Crown. In endeavouring to arrive at a conclusion upon that subject, we should be guided by any direct authorities as well as by analogous cases in our own law, and by the principles of law which have been laid down and established in our courts; and, as the rules and principles of our mercantile and maritime law are in a large measure derived from foreign sources, we gladly avail ourselves of the codes and laws of other countries, and especially of the Roman Civil Law, to see what amongst civilized nations has usually in like cases been considered reasonable and just.

In our own law there are not many authorities to be found upon this subject; but, as far as they go, they are in favour of the view, that, when goods of different owners become by accident so mixed together as to be undistinguishable, the owners of the goods so mixed become tenants in common of the whole, in the proportions which they have severally contributed to it. The passage cited from the judgment of Blackburn, J., in the case of the tallow which was melted and flowed into the sewers, is to that effect: *Buckley* v. *Gross*. (1) And a similar view was adopted by Lord Abinger in the case of the mixture of oil by leakage on board ship, in *Jones* v. *Moore*. (2)

It has been long settled in our law, that, where goods are mixed so as to become undistinguishable, by the wrongful act or default of

(1) 3 B. & S. 574. (2) 4 Y. & C. 351.

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one owner, he cannot recover, and will not be entitled to his proportion, or any part of the property, from the other owner: but no authority has been cited to shew that any such principle has ever been applied, nor indeed could it be applied, to the case of an accidental mixing of the goods of two owners; and there is no authority nor sound reason for saying that the goods of several persons which are accidentally mixed together thereby absolutely cease to be the property of their several owners, and become bona vacantia.

The goods being before they are mixed the separate property of the several owners, unless, which is absurd, they cease to be property by reason of the accidental mixture, when they would not so cease if the mixture were designed, must continue to be the property of the original owners; and, as there would be no means of distinguishing the goods of each, the several owners seem necessarily to become jointly interested, as tenants in common, in the bulk.

This is the rule of the Roman Law as stated in Mackeldey's Modern Civil Law, under the title Commixtio et Confusio, in the special part, Book 1, s. 270. In the English edition of 1845, at p. 285, the passage is as follows:—"The mixing together of things solid or dry (commixtio) or of things liquid (confusio) which belong to different owners, has no effect upon their rights in the things, if the latter can be separated. If, on the other hand, such separation is not practicable, then the former proprietors of the things now connected will be joint owners of the whole, whenever the mixture has been made with the consent of both parties, or by accident."

We need not discuss the distinction sometimes made between commixtio and confusio, apparently upon the ground that it is possible to separate the individual solid particles, but not the liquid; because, in cases like the present, it is impracticable, and for all business purposes therefore impossible, to distinguish the particles, in respect of ownership.

The passages in Mr. Justice Story's work on Bailments, s. 40, and in the 9th volume of Pothier, "De La Confusion," as well as the French and various other codes, are to the same effect.

We are thus, by authorities in our own law, by the reason of the thing, and by the concurrence of foreign writers, justified in adopting the conclusion that, by our own law, the property in the cotton of which the marks were obliterated did not cease to belong

to the respective owners; and that, by the mixture of the bales, and their becoming undistinguishable by reason of the action of the sea, and without the fault of the respective owners, these parties became tenants in common of the cotton, in proportion to their respective interests. This result would follow only in those cases where, after the adoption of all reasonable means and exertions to identify or separate the goods, it was found impracticable to do so.

We cannot assume that the whole of the plaintiffs' forty-one bales were amongst those that were destroyed, any more than we can assume that they all formed part of the 1645 which were brought home; and we see no means of determining the extent of the interest of the several owners, except by adopting a principle of proportion, and which would, we think, be equally applicable in determining the plaintiffs' portion of the 231 bales that were totally lost as of the 1645 which arrived in this country, though without the marks.

The principle of proportion is that which was applied by Lord Ellenborough, where one gross sum was paid to a broker in respect of two debts due to different principals without distinguishing how much was paid in respect of each: *Flavenc* v. *Bennett.* (1) It is also the principle adopted in cases of general average, and of jettison, where it is not known whose goods are sacrificed, as stated by Cassaregis and Emerigon in the passages that were quoted in the argument; and we think it is the proper principle to apply to this case.

Upon the main question, therefore, that was argued before us, we think that there was not an actual total loss of the plaintiffs' forty-one bales of cotton. We think also there was not a constructive total loss of those bales. We adopt the principle upon which the defendants have paid money into court; and our decision upon this question is in their favour.

It was attempted to shew by calculations what was the probability of the plaintiffs' bales being included or not in the quantity totally lost; but, in the absence of information as to the part of the vessel in which those bales were stowed, so as to shew whether they were exposed, and to what extent, to the perils which

(1) 11 East, at p. 41.

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caused the total loss of the bales that perished, it is obvious that such calculations can result only in dry formulæ of combinations, subject to be disturbed by the missing element of extent of exposure to danger, and that they furnish no practical assistance upon the one side or upon the other.

It was upon a calculation of this description that Mr. Griffith Williams, on behalf of the plaintiffs, for the first time, at a very late stage of the argument, contended that, assuming the defendants' principle to be correct, yet that it had not been correctly applied. Mr. Williams has, however, failed to satisfy us that the calculation was incorrect. It seems to us that, so far as it is practicable, and without entering into every minute circumstance and probability connected with the state of the weather and of the vessel, the position of the different parts of the cargo, and the effects of the sea and weather upon the vessel and cargo, upon which there was no evidence, the amount paid into court, together with the other payments, is sufficient to cover the plaintiffs' claim, so far as it was proved, for an average loss.

Upon the remaining question which was raised, as to whether, if there were a total loss, it was a loss proximately by the perils of the seas, it is not necessary to pronounce any opinion.

Our judgment is in favour of the defendants; and the rule to enter the verdict for them, or a nonsuit, will therefore, at the election of the plaintiffs as to the alternative, be made absolute.

Rule absolute accordingly.

Attorneys for plaintiffs: *Field, Roscoe, Field, & Francis, for Bateson, Robinson, & Morris, Liverpool.*

Attorneys for defendants: *Sharpe, Parkers, & Pritchard, for Harvey, Jevons, & Ryley, Liverpool.*

PELL *v.* LINNELL AND ANOTHER. 1868 *May 2.*

Practice—Costs of the Day—Suggestion of Death of one of two Defendants.

Where a plaintiff has a reasonable excuse for not proceeding to trial pursuant to notice, and has been guilty of no default, the defendant is not entitled to costs of the day, under s. 99 of the Common Law Procedure Act, 1852.

In an action against A. and B., notice of trial was given for the Bristol assizes, which commenced on the 13th of August. On the 10th, Saturday, the plaintiff's attorney became aware that B. was dead. No suggestion was entered on the record, and on the 12th the plaintiff gave a notice by telegram that he did not mean to try at those assizes. Notwithstanding this notice, A. attended with his witnesses at Bristol. The plaintiff did not appear:—

Held, that the plaintiff had not been guilty of such default as to entitle A. to costs of the day.

Semble, that a suggestion of B.'s death might have been entered by either party.

ACTION against Linnell and Beesley for an illegal distress. On the 3rd of August, 1867, notice of trial was given for the Bristol assizes, the commission-day for which was Tuesday, the 13th. On the previous Saturday, the plaintiff having learnt that the defendant Beesley was dead, the clerk of the plaintiff's attorney saw the managing clerk of Linnell's attorney, and offered to suspend the proceedings if requested; and, upon the latter declining to make the request, the former said, "Then, matters must go on." On Monday, the 12th, however, the plaintiff's attorneys in London wrote a letter to the defendants' attorney intimating that they did not intend to proceed, and also sent a telegram to the same effect, which was duly received on the 12th. The letter would not in course of post reach Bristol until the morning of the 13th. Linnell attended at Bristol on the 13th with his witnesses. The plaintiff did not appear. No suggestion of the death of Beesley had been entered on the record. The defendant Linnell having obtained an order of Pigott, B., for costs of the day,

C. Russell, on a former day, obtained a rule nisi to set it aside, on the ground that, in the absence of a suggestion of the death of Beesley, the cause could not be tried, and consequently the plaintiff was not in default.

H. James shewed cause. The plaintiff ought to have counter-

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manded his notice of trial, according to s. 98 of the C. L. P. Act, 1852, four days before the time mentioned in the notice of trial. Not having done so, the defendants' attorney was justified in having his witnesses ready at Bristol on the 13th.

[BOVILL, C.J. Assume that he was right in so doing, what is the default on the part of the plaintiff which entitles him to costs of the day? One of the defendants being dead, and there being no suggestion of that fact on the record, no trial could legally take place at that assize.]

It was the plaintiff's duty to cause the suggestion to be entered: s. 136. His attorneys' clerk was aware of the death on Saturday the 10th.

[BOVILL, C.J. There is no definite time fixed by the practice of the Court for entering a suggestion. The party must have a reasonable time for doing it. He is not to be visited with costs unless there has been a wilful default.]

Reading the 99th section, as to costs of the day, with the 98th, there clearly was such a default on the part of the plaintiff as to warrant this order.

C. Russell, in support of the rule. Section 98 of the C. L. P. Act, 1852, has no bearing on this question. This is an application to the discretion of the Court under s. 99. If the plaintiff has a reasonable excuse for not proceeding to trial, costs are never allowed: *Mullings* v. ————. (1) The order was obtained on the ordinary affidavit that issue had been joined, and notice of trial given and not duly countermanded. The cause in which issue was joined was an action against two defendants. One of them having died, no trial could take place without a suggestion, which might be made by either party. *Pinkus* v. *Sturch* (2) is precisely in point. *Barnewall* v. *Sutherland* (3) is also an authority to shew that without a suggestion of the death a trial would have been irregular.

BOVILL, C.J. I am of opinion that the surviving defendant in this case is not entitled to the costs of the day. It is admitted that there was no countermand of the notice of trial, pursuant to s. 98 of the Common Law Procedure Act, 1852. That alone, how-

(1) 5 Taunt. 88. (2) 5 C. B. 474. (3) 9 C. B. 380.

ever, does not entitle the defendant to costs of the day. Nor is it the 99th section that gives costs; it merely regulates the mode of obtaining them. The costs are not given as a matter of course. The plaintiff may have a reasonable excuse for not proceeding to trial. Here, one of the defendants had died. The action did not thereby abate; but it was suspended, so that no trial could take place until a suggestion of the death had been entered upon the record. If the cause had proceeded to trial without such suggestion, according to *Rex* v. *Cohen* (1), cited in *Barnewall* v. *Sutherland* (2), no perjury could be assigned upon any false evidence given thereon, which is a strong authority to shew that the whole trial would be a nullity. Mr. James has assumed that it was the plaintiff's duty to enter the suggestion. He has, however, cited no authority for that. And for anything I am aware of, the suggestion might have been entered by the surviving defendant. Neither party having entered a suggestion, the cause could not proceed to trial. It follows that there has been no default on the part of the plaintiff. The trial has been suspended by the act of God. Assuming it was the duty of the plaintiff to enter the suggestion, it by no means follows that therefore the defendant is entitled to the costs of the day. It is a question whether or not the plaintiff had a reasonable excuse for not proceeding to try. If he had, there ought to be no costs. Illness or absence of a material witness has always been considered a sufficient ground to excuse a default. Surely the death of one of two defendants must equally be a sufficient ground. There might be considerations to make it inexpedient for the plaintiff to proceed with the action against the surviving defendant. I think no default has been shewn here, and that there is no such rule of practice as Mr. James has contended for. Where there is a reasonable excuse for not proceeding to trial, and no wilful default on the part of the plaintiff, the defendant is not entitled to the costs of the day.

BYLES, J. I am of the same opinion. At common law, where one of the parties died before trial, the action abated, and the costs of the proceedings were thrown away. As the law now

(1) 1 Stark. N. P. C. 511. (2) 9 C. B. 388.

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stands, however, if there be two or more plaintiffs or defendants, and one of them dies, the action does not abate thereby, but, such death being suggested upon the record, the action proceeds by or against the survivors. The proceedings are stayed by the act of God until one party has entered the suggestion. As the plaintiff here could not have proceeded to trial without a suggestion, I cannot see that he has been guilty of such a default as to entitle the surviving defendant to the costs of the day.

Rule absolute.

Attorneys for plaintiff: *Elmslie, Forsyth, & Sedgwick, for G. Pell, Northampton.*

Attorney for defendant: *J. B. Marsden, for R. Howes, Northampton.*

May 4.

NAOROJI AND ANOTHER *v.* THE CHARTERED BANK OF INDIA.

Bankruptcy—Mutual Credits—Bankrupt Act, 1849 (12 & 13 *Vict. c.* 106), *s.* 171 *—Authority to collect Money.*

The plaintiffs were in the habit of drawing bills upon merchants in Bombay, and handing them to the defendants, bankers in London, for collection by the defendants' Bombay branch, the proceeds when received being remitted by the Bombay branch to the plaintiffs through the defendants' house in London. The plaintiffs executed a deed of inspectorship under the Bankruptcy Act, 1861, the defendants then having in their hands 3248*l.* of the plaintiffs', the proceeds of bills collected in Bombay. At the same date the plaintiffs were indebted to the defendants on certain bills of exchange in the sum of 8335*l.* :—

Held, a case of mutual credit within s. 171 of the Bankrupt Act, 1849. *Young* v. *Bank of Bengal* (1 Moo. P. C. 150) distinguished.

SPECIAL case, pursuant to a judge's order, in an action brought to recover the proceeds of certain bills of exchange received by the defendants on account of the plaintiffs.

1. The plaintiffs are merchants who up to June, 1866, carried on business in London; and the defendants are a banking company in London having a branch establishment at Bombay.

2. The course of the plaintiffs' business necessitated the drawing of a large number of bills of exchange by the plaintiffs on certain native firms at Bombay, which bills were transmitted to Bombay for

acceptance, and the proceeds of which, as they respectively became due, were collected there on behalf of the plaintiffs, and were remitted to England for the plaintiffs.

3. The plaintiffs were accustomed to hand such bills in batches, as they were drawn, to Hunter & Co., agents of the plaintiffs in London, to be transmitted to Bombay, and collected there, and remitted to England for the plaintiffs.

4. In handing such bills to Hunter & Co., the plaintiffs gave no directions and expressed no wishes as to the persons through whom or the means whereby they should be transmitted to and collected at Bombay. Hunter & Co. invariably employed the defendants for that purpose; and the plaintiffs were fully aware that they did so, and did not at any time make any objection thereto. The defendants remitted the proceeds of the bills which they had collected, by their Bombay branch remitting to the defendants drafts drawn by such Bombay branch in the plaintiffs' favour on the City Bank, and by the defendants on receipt of such drafts handing them, together with a letter from the defendants, to Hunter & Co., who delivered such drafts, together with a copy of such letter, to the plaintiffs. Hunter & Co. generally delivered such drafts and copy of letters on the day on which they received them; but, if they received such drafts and letters late in the day, they sometimes did not deliver them until the following morning. No objection was made by Hunter & Co., or by the plaintiffs, to the Bombay branch remitting the proceeds to the defendants instead of direct to Hunter & Co. The defendants at the time banked, and have ever since continued to bank, with the City Bank. In May and June, 1866, Hunter & Co., as the plaintiffs' agents, in the ordinary course of business, handed to the defendants, in four different batches for collection in Bombay, thirty-one bills of exchange drawn by the plaintiffs.

9. There never was any arrangement between Hunter & Co. and the plaintiffs that Hunter & Co. should hold the drafts delivered to them by the defendants, as mentioned in par. 4, or any of them, as a security; and Hunter & Co. never claimed so to hold them. Hunter & Co. acted for the plaintiffs as insurance-brokers and otherwise; but the plaintiffs never were indebted to Hunter & Co., except occasionally upon the account-current

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between them, the balance of which was sometimes for a short time against the plaintiffs to the amount of from 500*l.* to 1000*l.*

The defendants have collected and received 3248*l.* 0*s.* 9*d.* in respect of eleven of the bills; but they have received nothing whatever in respect of the remaining twenty bills, which were either refused acceptance or dishonoured at maturity: and it is to recover the proceeds of those eleven bills that this action is brought.

11. On the 29th of June, 1866, the plaintiffs' firm stopped payment, and on that day executed a valid inspectorship deed, under s. 192 of the Bankruptcy Act, 1861, to which the defendants were parties. On the 19th of July, 1866, the deed was duly registered. A copy thereof was appended to the case.

12. At the time when the plaintiffs' firm stopped payment, the defendants were, and they still are, the indorsees and holders for value of six bills of exchange accepted by the plaintiffs, and there was and is still due and unpaid to the defendants in respect thereof 8335*l.* 1*s.* 8*d.*

17. On the 9th of February, 1867, the writ in this action was issued.

18. The Court was to be at liberty to make any amendments in the pleadings, on such terms as to the Court should seem proper, and to draw any inferences of fact.

The question for the opinion of the Court was, whether, under the circumstances above stated, the defendants were entitled to retain the whole or any part of the said sum of 3248*l.* 0*s.* 9*d.*, the proceeds of the said bills of exchange collected on behalf of the plaintiffs, as a set-off or otherwise against the said sum of 8335*l.* 1*s.* 8*d.* due to the defendants on the six bills of exchange in the 12th paragraph mentioned.

Watkin Williams (*M'Leod* with him), for the plaintiffs. The question is whether the transactions between these parties were "mutual credits" within the bankrupt law. That the defendants gave credit to the plaintiffs, is conceded: the only question is whether by the dealings between them the plaintiffs gave credit to the defendants, by authorizing them to collect their bills in India. To constitute a case of mutual credit, within the 171st

section of the Bankrupt Act, 1849, 12 & 13 Vict. c. 106 (or the earlier statutes, beginning with 5 Geo. 2, c. 30, s. 28), the credits must be such as must in their nature terminate in debts: *Easum* v. *Cato*. (1) The true rule is that which is laid down by Gibbs, C.J., in *Rose* v. *Hart* (2): "Something more is certainly meant here (3) by *mutual credits* than the words *mutual debts* import; and yet, upon the final settlement, it is enacted merely that one *debt* shall be set against another. We think this shews that the legislature meant such *credits* only as must in their nature terminate in *debts*, as, where a debt is due from one party, and credit given by him on the other for a sum of money payable at a future day, and which will then become a debt, or where there is a debt on one side, and a delivery of property with directions to turn it into money on the other; in such case the credit given by the delivery of the property must in its nature terminate in a debt, the balance will be taken on the two debts, and the words of the statute will in all respects be complied with: but, where there is a mere deposit of property, without any authority to turn it into money, no debt can ever arise out of it, and therefore it is not a credit within the meaning of the statute." In the present case, the authority given to the defendants to receive the bills might have been revoked at any time. It was entirely optional with the plaintiff whether the credit should ever become a debt or not. It was not, therefore, a giving of credit within the meaning of the bankrupt law. *Young* v. *Bank of Bengal* (4) is precisely in point. There Palmer & Co. borrowed money from the Bank of Bengal, and deposited securities, and authorized the bank, in default of re-payment of the loan by a given day, to sell the securities,—rendering to Palmer & Co. any surplus. Before default was made in the re-payment of the loan, Palmer & Co. were declared insolvents. At the time of the adjudication of insolvency the bank were holders of two promissory notes of Palmer & Co., which they had discounted for them before the agreement as to the deposit of the securities. The time for re-payment of the loan having expired, the bank sold the securities, which realised more than the amount of the principal and interest due on the loan. In an action by the

(1) 5 B. & A. 861.
(2) 8 Taunt. 499, 506.
(3) In the 5 Geo. 2, c. 30, s. 28.
(4) 1 Moo. P. C. 150.

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assignees of Palmer & Co. against the bank, to recover this surplus, it was held that the bank could not set off the amount of the two promissory notes, and that the case did not come within the clause of mutual credit in the Bankrupt Act. Lord Brougham, in delivering the judgment of the Privy Council, after referring to several cases, said (1): "In none of those cases was there any uncertainty as to the party said to receive the credit becoming, sooner or later, debtor in præsenti to the other; in none of them did the existence of the relation of debtor and creditor depend upon the pleasure of one party: in all of them the party said to have given the credit had placed the other party in a situation which he himself could not alter,—had given him funds of which he could not dispossess him, or, which is the same thing, *a power over funds which he could not revoke.*"

[BYLES, J. In that case the security was deposited for a particular purpose. Besides, that case was considered, and not favourably, in *Alsager* v. *Currie.* (2)]

There is nothing in *Alsager* v. *Currie* (2) at all calculated to throw doubt upon the decision of the Privy Council. No irrevocable power was given to these defendants to receive the funds. The deposit of the bills with them merely placed them in a position in which they might or might not become debtors to the plaintiffs.

[BYLES, J. The bank would in the ordinary course of business become debtors to the plaintiffs.]

Here, the employment of the defendants to collect debts for the plaintiffs in India clearly was not a giving of credit to them. To bring a case within the statute, there must be such a trusting as must in the end result in a debt.

J. Brown Q.C. (*Cohen* with him), for the defendants, was desired by the Court to address himself to the argument that the mutual clause of the Bankrupt Act does not apply, where the trust or authority to collect is revocable. Except *Young* v. *Bank of Bengal* (3), there is no authority for saying that the fact of the authority to receive the moneys being revocable takes the case out of the operation of s. 171 of the Bankrupt Act, 1849; and that case is distinguishable, on the ground that there the security was de-

(1) 1 Moo. P. C. at p. 165. (2) 12 M. & W. 751.
(3) 1 Moo. P. C. 150.

posited with the bank with authority to turn it into money only upon failure to repay the loan on the stipulated day. Here, at the time the bills were placed in the hands of the defendants, the defendants were giving credit to the plaintiffs: and it is enough to say that their authority to collect the Indian debts continued down to the time of the execution by the plaintiffs of the deed of inspectorship (the period of time which fixes and defines the rights of the parties), and that while the deed remained in force they gave credit to the plaintiffs by advances upon their acceptances to the extent of 8335*l.* 1*s.* 8*d.* [He was stopped.]

BOVILL, C.J. I am of opinion that the defendants are entitled to judgment. It is admitted that there was a debt due from the plaintiffs to the defendants. The whole question turns on whether there was a debt due from the defendants to the plaintiffs so as to constitute a case of mutual credit within the meaning of the Bankrupt Act, 1849. The facts were these:—The plaintiffs, through their agents, employed the defendants, who were bankers in London, having a branch establishment at Bombay, to transmit to that place bills drawn by the plaintiffs on native firms there for collection, the Bombay branch remitting short bills for the moneys received. From the very nature of the employment it must necessarily follow that the money will be received and a debt be created. The turning point is what was the state of things at the time of the bankruptcy, or that which is for this purpose equivalent thereto, at the execution of the deed. The bills were in the hands of the defendants for the purpose of collection. In that state of things, a debt must necessarily arise. If so, there can be no doubt it would be a case of mutual credit within the bankrupt law. *Rose* v. *Hart* (1) is a binding authority, and has not been overruled. Itself it overruled some previous cases, and was decided after consultation with many of the judges. The language of the judgment was evidently much considered. Mr. Williams has strongly urged that the case of *Young* v. *Bank of Bengal* (2) is opposed to *Rose* v. *Hart* (1), and is a decision in his favour. Lord Brougham, however, in giving judgment in that case, says (3): "There is no-

(1) 8 Taunt. 499. (2) 1 Moo. P. C. 150.
(3) 1 Moo. P. C. at p. 165.

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thing inconsistent with what has now been advanced in the decision, in the language used by the Court of Common Pleas in the case of *Rose* v. *Hart* (1), where the former case of *Olive* v. *Smith* (2) was re-considered, and a material qualification added to the generality of the doctrine which had been there laid down." His lordship does not propose to distinguish the two cases, but says in effect that the law which the Privy Council is there laying down is not distinguishable from the law already laid down in this Court. In the judgment in *Rose* v. *Hart* (3), the Chief Justice says: "Something more is certainly meant here by *mutual credits* than the words *mutual debts* import; and yet, upon the final settlement, it is enacted merely that one *debt* shall be set against another. We think this shews that the legislature meant such *credits* only as must in their nature terminate in *debts*, as, where a debt is due from one party, and credit given by him on the other for a sum of money payable at a future day, and which will then become a debt." That is the first rule which has always been recognized and adopted down to the present time. Then comes the second, "or where there is a debt on one side, and a delivery of property with directions to turn it into money on the other." That seems to me to be exactly this case. Running bills are delivered to the defendants with directions to turn them into money. His lordship continues,—"In such case the credit given by the delivery of the property must in its nature terminate in a debt, the balance will be taken on the two debts, and the words of the statute will in all respects be complied with." In the present case, the transaction must in its nature terminate in a debt. Then the Chief Justice puts the third proposition,—"But, where there is a mere deposit of property, without any authority to turn it into money, no debt can ever arise out of it, and therefore it is not a credit within the meaning of the statute." That is the proposition which governed the decision in *Rose* v. *Hart*. (1) *Young* v. *Bank of Bengal* (4) introduces circumstances of a peculiar character. It was not simply a delivery of a security for the purpose of receiving the money: but a deposit of the security, with a power of sale. The ordinary character of the transaction did not impose on the defendants a duty to receive the

(1) 8 Taunt. 499.
(2) 5 Taunt. 56.
(3) 8 Taunt. at p. 506.
(4) 1 Moo. P. C. 150.

money; but only to receive it in the event of default being made in repayment of the loan at the time stipulated. When realized it would become a debt. That may be a further proposition to be annexed to what Gibbs, C.J., lays down in *Rose* v. *Hart.* (1) The distinction is manifest here: the money would in the ordinary course of business be received for the bills, and would necessarily become a debt. Again, in *Young* v. *Bank of Bengal* (2), Lord Brougham puts it that, though there was a power to sell and to pay over the surplus, it was only in præsenti a bailment. As to the power being revocable, there was no power of revocation of the authority to sell in that case, unless Palmer & Co. repaid the advances. In the view I take of the case, it is enough to say that it falls within the second proposition in the judgment of Gibbs, C.J., in *Rose* v. *Hart* (3), and is not interfered with by that of the Privy Council in *Young* v. *Bank of Bengal.* (2) The observations of Parke, B., in *Alsager* v. *Currie* (4), upon the last-mentioned case, are also beside this, for the reasons I have already referred to. Upon the whole, I am of opinion that the defendants are entitled to judgment.

BYLES, J. I am of the same opinion. By virtue of the late Bankruptcy Act, this deed when registered has an effect equivalent to an adjudication of bankruptcy, and relates back to the date of its execution. The dividing line, therefore, is the execution of the deed. The question then is, whether at the time of its execution there was a mutual credit between these parties. In the 2 Geo. 2, c. 30, s. 28, cross-debts are spoken of as mutual debts. Mutual credits I conceive to mean simply reciprocal demands which must naturally terminate in a debt. It seems to me that the transaction described in this case would naturally terminate in a debt. The only doubt which has crossed my mind has arisen from the case of *Young* v. *Bank of Bengal.* (2) But Lord Wensleydale, in *Alsager* v. *Currie* (4), says that case overrules *Olive* v. *Smith* (5); and it certainly is inconsistent with *Rose* v. *Hart* (1), a decision of one of the greatest judges who ever sat in

(1) 8 Taunt. 499.
(2) 1 Moo. P. C. 150.
(3) 8 Taunt. at p. 506.
(4) 12 M. & W. 751.
(5) 5 Taunt. 56.

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this court. The present case, however, is distinguishable from *Young* v. *Bank of Bengal.* (1) The very object of the arrangement there was that the trust should not terminate in a debt. The case is not only distinguishable, but is moreover a very doubtful authority.

KEATING, J. I am of the same opinion. This is clearly a case of mutual credit within s. 171 of the Bankrupt Act, 1849. The plaintiffs were indebted to the defendants on the one side, and the securities were entrusted to the defendants on the other for the purpose of being turned into money. This creates a liability which in the ordinary course must result in a debt.

MONTAGUE SMITH, J. I am of the same opinion. The material question is whether there was a credit given by the plaintiffs to the defendants in the sense contemplated by s. 171 of the Bankrupt Act, 1849, at the time of the execution of the deed. I think there was. Assuming the original authority to receive the money was revocable, it was unrevoked at the time the deed was executed, and that is the time we must look to, in order to determine whether or not the defendants are entitled to the benefit of the enactment. To bring a case within the act, it is not necessary that the credits should be dependent the one upon the other, nor that there should have been any agreement beforehand. The object of the enactment seems to me to have been, that, where merchants have had mutual dealings, each giving credit to the other, relying upon each other's solvency, in the event of the bankruptcy of one of them, the account shall be taken between them of all such credits and dealings as in the natural course of business would end in debts, and the balance shall be the debt due from the one to the other. I think our decision in this case is consistent with the general current of authorities, and not opposed to any decision based upon a similar state of facts.

Judgment for the defendants.

Attorneys for plaintiffs: *Freshfields & Newman.*
Attorneys for defendants: *Oliverson, Peachey, & Co.*

(1) 1 Moo. P. C. 150.

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May 8.

DARBY *v.* WATERLOW, AND ANOTHER.

Sheriff—Interpleader Order—Security to the Satisfaction of the Master—Practice—Stamp.

By an interpleader order, the sheriff was ordered to withdraw from possession of goods seized under a fi. fa. upon payment into court by the claimant of 50*l.*, or upon his giving security for that amount, to the satisfaction of the master. On the last day for giving security, the claimant's attorney, without giving notice to the execution-creditor, tendered to the master a bond with two sureties, at the same time untruly informing him that the sureties were approved by the execution-creditor. The master accepted the security; and the claimant's attorney, on the same day, gave the sheriff notice to withdraw, as security had been given pursuant to the interpleader order. The sheriff immediately withdrew from possession. It was afterwards on the same day discovered that the bond was unstamped, and notice of that fact was at once given to the claimant's attorney, and he on the following morning accompanied a messenger from the master's office to Somerset House with the bond, and got it stamped:—

Held, that, as between the sheriff and the execution-creditor, the sheriff was justified in withdrawing from possession.

ACTION against the sheriff of Middlesex for wrongfully withdrawing from possession under a fi. fa.

The cause was tried before Byles, J., at the second sitting at Westminster in Hilary Term last, when the following facts were proved:—In June, 1867, certain goods were seized under a fi. fa. on a judgment obtained by the plaintiff against one Butson. One Davis claimed the goods, and Wiles, J., on the 15th of June, by an interpleader order, ordered that, upon payment of 50*l.* into court by the claimant within ten days, or upon giving within the same time security to the satisfaction of one of the masters for the payment of the same amount by the claimant, and upon payment of the possession money, the sheriff should withdraw from possession, and directed an issue between the execution-creditor, the plaintiff, and the claimant, to try the right to the goods. On the 25th of June, the last day for giving security, the claimant's attorney, without any notice to the execution-creditor, tendered a bond for 50*l.*, executed by the claimant and two sureties, to the master, informing him untruly that the sureties were approved of by the execution-creditor. The master took the bond, and the usual fee was paid. The claimant's attorney, between 6 and 6.30 P.M., on the same day gave notice to the sheriff that a

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bond with two sureties to the satisfaction of the master had that day been filed in pursuance of the order of Willes, J., and the sheriff thereupon withdrew from possession.

On the same day the master's clerk discovered that the bond had no stamp. Notice was at once sent to the claimant's attorney. On the following morning, the 26th, the attorney went to Somerset House, accompanied by a messenger from the master's office, and the bond was then stamped and carried back by the messenger to the master's office, where it was marked as "filed on the 26th of June." On the 26th of June the sheriff received notice from the execution-creditor not to withdraw, as the master's approval of the sureties had been improperly obtained.

Application was afterwards made to Bramwell, B., at chambers, to take the bond off the file, on the ground that no notice had been given to the attorney for the execution-creditor of the application to the master to approve the sureties. The learned judge, on the 2nd of August, after hearing the attorneys for the execution-creditor and the claimant, made an order to that effect, and also to set aside the interpleader issue, on the ground that the order of Willes, J., had not been complied with. By a subsequent order of Bramwell, B., made on the 16th of January, 1868, after hearing the attorneys for the sheriff as well as those of the execution-creditor and the claimant, so much of the order of the 2nd of August as directed that the bond should be taken off the file was rescinded, and the bond ordered to be re-filed valeat quantum.

On these facts a verdict was entered for the plaintiff, the execution-creditor, for 50*l.*, subject to the opinion of the Court upon all questions of law and fact.

Quain, Q.C., in Hilary Term last, pursuant to the leave reserved, obtained a rule nisi to enter a verdict for the defendants or a nonsuit, on the ground that the order of Willes, J., was, so far as the sheriff was concerned, duly complied with; or to reduce the damages to a nominal sum.

Gray, Q.C., and *Littler*, shewed cause. By the terms of the order of Willes, J., the claimant was to pay into court 50*l.*, or to give a bond to that amount with two sureties, to the master's satisfaction, on or before the 25th of June. On the 25th the master was

improperly induced to approve the security offered. That clearly was no compliance with the condition contained in the order.

[MONTAGUE SMITH, J. Was not security given to the satisfaction of the master on the 25th? There was no condition that the bond should be filed.]

To satisfy the condition, the bond should have been a perfect instrument. On the 25th the document delivered to the master was, as well against the sheriff as against the party, a mere nullity.

[BYLES, J. It was a complete deed on the 25th. It is true, a certain ceremony remained to be performed before it could be made available, viz. the stamping.]

At all events, it was not filed by the proper officer until the 26th. The goods, therefore, were improperly given up; and the only measure of damages is 50*l.*, the sum at which the parties themselves had valued them: Mayne on Damages, 267.

[MONTAGUE SMITH, J. Suppose the bond had been duly stamped on the 25th, the execution-creditor would equally have been imposed upon. But the sheriff was in no default.]

It is a proceeding for the sheriff's protection which has failed. Why should the loss be thrown upon the plaintiff? She has been guilty of no negligence: whereas, the sheriff has improvidently acted upon the faith of a statement made to him by the claimant's attorney, without inquiry.

Day (*Quain, Q.C.*, with him), in support of the rule. The order of Willes, J., was duly complied with. A bond was given to the satisfaction of the master on the 25th of June. The absence of a stamp did not make it the less a bond. Filing was no part of the condition.

[*Master Park* informed the Court that it was not usual to file these securities at all, but that they are usually handed out to the obligee.]

The bond having been tendered at the master's office on the 25th, and accepted by the master, there was an end of the transaction. If the sheriff had gone to the office on the 25th, he would have found that security had been given to the satisfaction of the master. And, if he had gone on the 26th, he would have found the bond still there, with the addition of a stamp. The first order of Bram-

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well, B., was obtained on the ground that no notice had been given to the attorney for the execution-creditor, not on the ground that the bond was not stamped when received by the master. And, whatever might have been the effect of that order, it is removed by the second order of the same learned judge. [He was stopped by the Court.]

BYLES, J. I am of opinion that the rule to enter a verdict for the defendant should be made absolute. My Brother Willes's order was, that the goods seized under the fi. fa. should be delivered up to the claimant on payment of 50*l.* within ten days, or upon giving within the same time security for that amount to the satisfaction of one of the masters. I will assume that the bond was properly stamped when it was brought to the master. It was in form a security; and it was given to and accepted by the master. Nothing is said in the order about filing; nor is filing required by any statute or rule of court or practice; and, further, the master reports to us that it is not usual to file these securities. The bond was left with the master, and the proper fee was paid; and the sheriff, being informed, as the fact was, that security had been given to the satisfaction of the master, withdrew from possession. The order would, no doubt, have been duly complied with as far as the sheriff is concerned, if the bond had been stamped at the time it was left with the master. The only question before us is, whether the absence of a stamp makes any difference. If the security was to be given in the shape of a bill of exchange or a promissory note, the absence of a stamp would have been fatal. But here the instrument was a bond, and, without going out of the custody of the officer of the court, it was duly stamped within the time allowed by law for that purpose. The interpleader order stands, notwithstanding my Brother Bramwell's order setting aside the issue. For the reasons I have given, I think the bond was sufficiently delivered to the master, and the order of my Brother Willes complied with. I think that might be so even as between the parties. But that is not the question. The sheriff was informed on the 25th of June that security had been given to the satisfaction of the master. He was so informed by the claimant's attorney, which, as far as I know, is the only notice which in practice is ever given. And, moreover, if he had

gone then to the masters' office to make inquiry, he would have found that the information was true.

KEATING, J. I am of the same opinion. I at first entertained some doubt as to how far the sheriff had properly ascertained that security had been given to the satisfaction of the master before he withdrew from possession. Whatever might have been the state of things as between the claimant and the execution-creditor, as between the latter and the sheriff I think it is impossible to say that security had not been given to the satisfaction of the master on the 25th of June; and therefore, assuming that the sheriff takes the information at his peril, it turns out that the information was true, and he is entitled to the protection which the interpleader order gave him, the condition having been fulfilled.

MONTAGUE SMITH, J. I am of the same opinion. The question is, whether or not security was given to the satisfaction of the master on the 25th of June. It seems to me that it was, at all events, as regards the sheriff, and that the sheriff, after what had occurred, would have rendered himself liable to be proceeded against for disobedience of my Brother Willes's order if he had not withdrawn as he did. It does not seem to be the practice to bring the sheriff before the master when the security is given, but only the execution-creditor and the claimant. If the master is satisfied with the security, although on grounds which ought not to have satisfied him, yet, as far as the sheriff is concerned, the terms of the order are complied with. Here, a bond was brought to the master. He did not inquire as to the sufficiency of the sureties, because he was informed that no objection was made to them on the part of the execution-creditor. The master was satisfied that he had a security, and took the usual fee; and the bond was afterwards stamped. If the sheriff had gone then to the office to inquire, he would have been told that the condition of the order had been complied with. As between the plaintiff and the sheriff, no question could have arisen if the bond had been stamped when presented to the master on the 25th. And that difficulty was removed on the morning of the 26th. If Mr. Gray could have satisfied me that the filing of the bond was the usual and the only expression of the

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master's satisfaction with the security, I might have assented to his argument. But I find that is not so. The master may be satisfied, and yet the bond may never be filed at all. The only doubt I have felt was whether the satisfaction of the master was complete on the 25th of June. But, upon consideration, I think it was. The imposition practised upon him does not, I conceive, affect the question as between these parties. The sheriff was bound to withdraw when the master's satisfaction was made known to him.

Rule absolute.

Attorney for plaintiff: *F. Scarth.*
Attorneys for defendants: *Burchell & Hall.*

April 16.

BRAMBLE AND ANOTHER *v.* MOSS.

Debtor and Creditor—Bankrupt—Composition Deed under 24 & 25 *Vict. c.* 134, *s.* 192—*Evidence.*

Upon a plea of composition and release under s. 192 of the Bankruptcy Act, 1861:—

Held, that the production of the deed and certificate of registration, and sealed copies of the affidavits required by s. 192 and by the General Rules of 1862, will not dispense with proof that a majority in number representing three-fourths in value of the creditors of 10*l.* and upwards have in writing assented to or approved of the deed.

ACTION for goods sold and delivered.

Pleas: 1. As to 45*l.*, never indebted. 2. As to the residue, a deed of composition and release. The plea set out the deed, and concluded as follows: "And the defendant says that a majority in number representing three-fourths in value of the creditors of the defendant whose debts respectively amounted to 10*l.* and upwards in writing assented to or approved of the said deed, and the execution of the said deed by the defendant was attested by an attorney, and within twenty-eight days from the day of the execution of the said deed by the defendant the same was produced and left (having been first duly stamped) at the office of the chief registrar for the purpose of being registered, and together with such deed there was delivered to the said chief registrar an affidavit by the defendant

that a majority in number representing three-fourths in value of the creditors of the defendant whose debts amounted respectively to 10*l.* or upwards had in writing assented to or approved of the said deed, and also stating the amount of money distributable to all and every of the creditors of the defendant under the said deed; and such deed did before registration bear such ordinary and ad valorem stamp as by the statute in such case made is required; and all conditions precedent on the part of the defendant were performed and fulfilled, and all times elapsed, and all things happened, to entitle the defendant to plead the said deed in bar of this action; and the same was and is a bar to this action."

As to the 45*l.* the plaintiffs entered a nolle prosequi, and issue was taken on the second plea.

The cause was tried before Montague Smith, J., at the sittings in London after last Hilary Term. The only witness called to prove the plea was Mr. Smith, the defendant's attorney, who was also the attesting witness to the defendant's execution of the deed. He identified the defendant, and produced the deed, with the memorandum thereon required by s. 196 of the Bankruptcy Act, 1861, and sealed with the seal of the court of bankruptcy, a sealed office copy of the affidavit required by clause 5 of s. 192, a certificate of registration under s. 194, and a list of the creditors with the amount of their respective debts, with an affidavit verifying the same, as required by the General Order in Bankruptcy of May 22nd, 1862.

It was objected for the plaintiff that this was not enough to sustain the plea, but that the debtor should have been called to prove that the required majority of creditors had in fact assented to or approved of the deed.

On the other hand it was insisted that the documents produced under the seal of the court of bankruptcy sufficiently proved that all had been done to make the deed valid.

A verdict was taken for the plaintiff for the balance of the demand (80*l.* 0*s.* 8*d.*), leave being reserved to the defendant to move to enter the verdict for him if the Court should think the plea proved.

April 16. *Besley* moved accordingly. The evidence given was

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sufficient to sustain the plea. The 192nd section prescribes certain conditions to the validity of the deed, amongst others that a certain majority of the creditors shall assent thereto, that its execution by the debtor shall be attested by an attorney or solicitor, that it shall within twenty-eight days be left (duly stamped) at the office of the chief registrar for registration, and that an affidavit that the required majority have assented shall at the same time be delivered to the chief registrar. Sections 193—196 regulate the mode of registering; and s. 197 makes the deed, upon registration, binding upon all the creditors as in bankruptcy. Then s. 203 provides that any petition, assignment, or other proceeding appearing to be sealed with the seal of any court under the act, or any writing purporting to be a copy of any such document, and purporting to be so sealed, shall be admitted in all courts as evidence of such documents respectively, and of such proceedings having respectively taken place, and be deemed respectively records of such court, without any further proof thereof; and s. 206 provides that all copies of proceedings purporting to be signed by the proper officer, certifying the same to be a true copy, and appearing to be sealed with the seal of the court, shall at all times be admitted as sufficient evidence of the same, and of such proceedings respectively having taken place, without other proof. The object of these several enactments evidently was that the court of bankruptcy alone should have cognizance of the fact of the registration of the deed, and that a court of law should not inquire into the validity of the proceedings, or go behind the seal of that court. In *Kelly* v. *Morray* (1), a certificate of the choice and appointment of a creditors' assignee, dated before action, and sealed with the seal of the court of bankruptcy, was held to be conclusive evidence, in an action by the assignee so appointed, of his title to sue, even though it appeared that the signature of the commissioner was not affixed to the document until after the commencement of the action,—the certificate of appointment being a *record* of the Court.

[BOVILL, C.J. When the legislature meant to make a document evidence of the truth of the matters therein contained,

(1) Law Rep. 1 C. P. 667.

they knew how to do so; as in s. 14 of the 12 & 13 Vict. c. 106].

The plaintiffs, by taking issue on the plea generally merely put in issue the execution of the deed, and not the performance of all conditions precedent: Common Law Procedure Act, 1852, s. 57; Bullen and Leake, 2nd ed. 124 (a).

BOVILL, C.J. It seems to me that the evidence given at the trial was not sufficient to support the second plea. The whole of the averments were put in issue, and it was necessary to prove them. The certificate of registration was not sufficient for that purpose. Sections 203, 204, and 206 were relied on as making the documents which were produced evidence. Section 203 provides only that copies of proceedings and orders therein mentioned purporting to be sealed with the seal of the court, shall be admissible as evidence of such proceedings and orders having respectively taken place or been made, and shall be deemed records of the court, not that they shall be evidence of their contents. The 204th section provides that all courts, judges, and others shall take judicial notice of the signature of any commissioner or registrar, and of the seal of the court. And section 206 merely dispenses with the production of original documents, but does not make sealed copies evidence of their contents. The documents produced here, therefore, were evidence that such a deed as described was made; but there was nothing to shew that all the requirements of the statute had been complied with. I think there should be no rule.

BYLES, J. I quite agree that there is no ground for a rule. And moreover, ever since the introduction of these deeds the practice has been to prove all the allegations in the plea, which is easily done by calling the bankrupt himself.

KEATING, J. I am of the same opinion. An affidavit that the proper number of assents has been obtained is required for the purpose of procuring the registration of the deed. Upon the production of such an affidavit, it is the duty of the officer to register the deed: it is no part of his duty to inquire whether the state-

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ments contained in it are true or not; and the affidavit itself would not be evidence of that, unless made so by statute. None of the sections referred to make the statements therein evidence by the mere production of a sealed copy. I think the plea was not proved.

MONTAGUE SMITH, J. I am entirely of the same opinion. Section 192 makes the deeds therein described binding on all the creditors on certain requirements being complied with. The first is, that a majority in number representing three-fourths in value of the creditors for 10*l.* and upwards shall assent to or approve of the deed. That is a distinct and independent condition. The fourth requires the deed within twenty-eight days of its execution to be produced at the office of the chief registrar for the purpose of registration. And the fifth requires that, together with the deed, there shall be delivered to the chief registrar an affidavit by the debtor or some person able to depose thereto, or a certificate by the trustee, that a majority in number representing three-fourths in value of creditors of 10*l.* and upwards have assented to or approved of the deed. The statute, therefore, requires two things, —1. That a majority shall in fact have assented to the deed,— 2. Registration of the deed within twenty-eight days of its execution by the debtor, together with the affidavit required by s. 192. The documents produced at the trial proved the second of these requirements, but not the first.

Rule refused.

Attorney for defendant: *Joseph Smith.*

THE SOUTH OF IRELAND COLLIERY COMPANY *v.* WADDLE.

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April 29.

Companies Act, 1862, 25 & 26 *Vict. c.* 89—*Trading Corporation—Contract not under Seal.*

Whether a trading corporation can contract without seal or not, depends, not upon the magnitude or the insignificance of the subject-matter, but upon whether or not the contract be for a purpose connected with the objects of the incorporation.

A company incorporated under the Companies Act, 1862, for the working of collieries, contracted with an engineer for the erection of a pumping-engine and machinery for that purpose, and paid him part of the price. In an action by the company against the engineer for a breach of contract in refusing to deliver the engine and machinery :—

Held, that the action was maintainable, though the contract was not under seal.

By the articles of association of the company it was provided that the business thereof should be carried on under the management of the board of directors; and that the board, in addition to the powers and authorities by the statutes, and by those presents expressly conferred upon them, might execute all such agreements, and generally do all such acts and things as were by the statutes and those presents directed or authorized to be executed or done by the company in meeting, &c. :—

Held, by Bovill, C.J., and Byles, J., that the contract in question was warranted by the articles of association, and that there was nothing in them or in the statute requiring it to be under seal.

THE first count of the declaration claimed damages for breach of an agreement to deliver certain machinery which the plaintiffs had purchased of the defendants and partly paid for.

There was also a count for money had and received and money found due upon accounts stated.

Pleas: 1. That the defendant did not agree as alleged. 2. That the plaintiffs were not ready and willing to accept the goods or to pay for the same according to the terms of the contract. 3. Except as to 500*l.*, never indebted. 4. As to 500*l.*, parcel, &c., payment of that sum into court. Issue thereon.

The cause was tried before Montague Smith, J., at the sittings in London after last Trinity Term. The plaintiffs were a company incorporated under the Companies Act, 1862, 25 & 26 Vict. c. 89, for the purpose, as expressed in the memorandum of association, of purchasing, renting, or otherwise acquiring certain collieries and mines of coal under certain lands therein named, near Carrick-

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on-Suir, in the county of Kilkenny, and opening up, excavating, mining, working, and utilizing all or any of the said collieries and coal mines and premises, and generally doing and executing all such acts and things as should or might be or seem necessary or expedient or incidental to the objects aforesaid, or any of them.

By the articles of association, clause 3, it was provided that the business of the company should include the several objects expressed in the memorandum of association, and all matters which from time to time might appear to the directors expedient for attaining those objects.

Clause 4 provided that the business should be carried on by or under the management of the directors, subject only to such control of meetings as was provided by those presents.

Clause 77 was as follows:—"The business of the company shall be managed by the board, who, in addition to the powers and authorities by the statutes or by these presents expressly conferred upon them may exercise all such powers, give all such consents, make all such arrangements, and generally do all such acts and things as are or shall be by the statutes and these presents directed or authorized to be executed, given, made, or done by the company in meeting, but subject, nevertheless, to the provisions of the statutes and of these presents, and subject also to such, if any, regulations as are from time to time prescribed by the company in meeting."

The directors having advertised for tenders for the construction of machinery necessary to enable them to commence working, the defendant, an engineer at Llanelly, on the 5th of March, 1864, offered to construct the required engines and gearing, to be delivered free at Waterford, for 1550*l.*

By a resolution of the board of directors on the 4th of April, 1864, the defendant's tender was accepted, with 50*l.* additional for the erection of the machinery; the terms of payment to be as follows:—500*l.* in cash on the shipment of the pumping-engine; 500*l.* by three months bill on shipment of the remainder of the order; and 600*l.* by four months bill on the erection of the engine, &c., and on their being pronounced in working order by the company's manager.

On the 7th of March and 7th of June, 1865, respectively, the

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defendant received from the company in cash 300*l.* and 200*l.* on account; but, after considerable delay, the defendant declined to deliver any part of the machinery contracted for, unless security were given for payment of the remainder of the price, and the plaintiffs' works were consequently delayed.

On the part of the defendant it was objected that the contract, not being under the seal of the company, was void as against them, and therefore not binding on the defendant, for want of mutuality; and the case of *East London Waterworks Company* v. *Bailey* (1) was relied on.

Under the direction of the learned judge a verdict was taken for the plaintiffs (damages 500*l.*), leave being reserved to the defendant to move to enter a verdict for him or a nonsuit, if the Court should be of opinion that the contract required a seal.

Day, in Michaelmas Term last, obtained a rule nisi accordingly.

April 29. *Philbrick* (*Huddleston*, *Q.C.*, with him), shewed cause. A corporation created for trading purposes is not bound by the strict rule which regulates the mode of contracting by corporations properly so called. In matters connected with the purposes of their incorporation, they may contract without seal: *Broughton* v. *Manchester Waterworks Company* (2); *Beverley* v. *Lincoln Gas Light Company* (3); *Church* v. *Imperial Gas Light Company* (4); *Clark* v. *Cuckfield Union* (5); *Henderson* v. *Australian Royal Mail Steam Navigation Company*. (6) *East London Waterworks Company* v. *Bailey* (1) proceeded upon the ground that the powers of the directors were specifically limited and defined by the act of parliament creating the company, and did not authorize the making of such a contract as that before the Court, without seal. The judgment admits the principle of necessity as applied to corporations created for purposes of trade; and, so far as it is at variance with the later decisions in the Court of Queen's Bench, it is not law. Besides, here the contract has been in part executed. The defendant has received 500*l.* of the purchase-money. He is, therefore, estopped

(1) 4 Bing. 283.
(2) 3 B. & A. 1.
(3) 6 Ad. & E. 829.
(4) 6 Ad. & E. 846.
(5) 1 Bail C. C. 85; 21 L. J. (Q.B.) 349.
(6) 5 E. & B. 409; 24 L. J. (Q.B.) 322.

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from denying the contract: *Fishmongers' Company* v. *Robertson.* (1) The magnitude of the contract can make no difference: see the observations of Erle, J., in *Henderson* v. *Australian Royal Mail Steam Navigation Company.* (2) And see Lindley on Partnership, vol i., p. 357. This being a contract made in furtherance of the objects of the company, and in precise conformity with the powers of the board as defined by the articles of association, was one which, independently of the general principle established by the more recent cases, it was competent to the directors to enter into without seal.

Powell, Q.C., and *Day*, in support of the rule. The view taken by the legislature as to contracts by trading companies does not coincide with the doctrine relied on in the argument for the plaintiffs: see 19 & 20 Vict. c. 47, s. 41; 30 & 31 Vict. c. 131, s. 37. It is impossible to distinguish *East London Waterworks Company* v. *Bailey* (3) from the present case. *London Docks Company* v. *Sinnott* (4) proceeded upon the same principle. The supply of pipes to a waterworks company is not less within the scope and object of its incorporation than the supply of a pumping-engine to a mine. In *Diggle* v. *London and Blackwall Railway Company* (5), Rolfe, B., referring to the cases in the Queen's Bench, and also to the recent case of *Lamprell* v. *Billericay Union* (6), says: "Whether in all these cases I should have come to the same conclusion—that the acts there done were acts of necessity—it is immaterial to consider, as in all of them the Court proceeded on the ground already stated, and adopted the general rule that those were cases of urgent necessity within the exception, which is a rule as much as the rule itself, and has been established by several authorities, viz., that corporations cannot be sued on simple contract, *unless* the act be one of necessity. I say necessity, for that really embraces all the excepted cases,—that is, matters too trivial or of too frequent occurrence, or, in the case of trading corporations, drawing bills, without which they could not carry on their

(1) 5 M. & Gr. 131.
(2) 5 E. & B., at p. 417; 24 L. J. (Q.B.) 322.
(3) 4 Bing. 283.
(4) 8 E. & B. 347; 27 L. J. (Q.B.) 129.
(5) 5 Ex. 442, 451; 19 L. J. (Ex.) 308.
(6) 3 Ex. 283; 18 L. J. (Ex.) 282.

trade, &c. With these exceptions, the old law remains as it did in the time of Henry VIII., and the earlier times before it. The work done here is done neither on a great necessity, nor is it a matter of frequent occurrence, nor is it one of a trivial nature. The contract price was 1436*l.* 15*s.* It is one solitary act, to be done for a large sum of money; and there is no good reason why the corporation should not have been called together for the purpose of solemnly confirming the contract by affixing the common seal of the company to it." Can it be said that the construction of a pumping and lifting engine is a matter of everyday occurrence, or of a trivial nature, or of a necessity or pressing, that it would be inconvenient to get the common seal affixed to it? In *Henderson* v. *Australian Royal Mail Steam Navigation Company* (1), the contract sued upon had relation to one of the ordinary incidents of the creation of the company, viz., the employment of a captain; and this is the foundation of Wightman, J.'s judgment. In *Ernest* v. *Nicholls* (2), Lord Wensleydale expresses his dissent from the principle of the decision in *Henderson* v. *Australian Royal Mail Steam Navigation Company* (1) and *Reuter* v. *Electric Telegraph Company.* (3) The decision in *Smith* v. *Hull Glass Company* (4) proceeded upon the ground that the order had been given by persons put forward by the directors as their agents, and that the goods had been received and used by them. In *Finlay* v. *Bristol and Exeter Railway Company* (5), Parke, B., says: "By the ancient common law a corporation was at liberty to do little matters without seal, namely, to appoint a servant and the like; but there is no case which goes the length of determining that they might contract not under seal, unless for small matters, or by virtue of the terms of their act of parliament." *Smart* v. *West Ham Union* (6) is also an authority to shew that this contract should have been under seal. The distinction between executory and executed contracts is repudiated by Lord Denman in *Church* v. *Imperial Gas Light Company* (7); and, as to the supposed

(1) 5 E. & B. 409; 24 L. J. (Q.B.) 322.

(2) 6 H. L. 401, 418.

(3) 6 E. & B. 341; 26 L. J. (Q.B.), 46.

(4) 11 C. B. 897; 21 L. J. (C.P.) 106.

(5) 7 Ex. 409; 21 L. J. (Ex.) 117.

(6) 10 Ex. 867; 24 L. J. (Ex.) 201.

(7) 6 Ad. & E. 846, 859.

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estoppel, Lord Campbell, C.J., in *Copper Miners Company* v. *Fox* (1) says: "The plaintiffs finally rely upon a suggestion of Tindal, C.J., in *Fishmongers' Company* v. *Robertson* (2), that, when a corporation have sued as plaintiffs upon a simple contract, they may possibly be for ever estopped from objecting that the contract was not binding upon them, so as to afford a remedy to the other side by cross action, and to take away the objection of want of reciprocity. But there is great difficulty in saying what shall be the form of action to which the opposite side may resort, or from what point of time the estoppel is to operate; and, after all, it would only give a remedy upon the contract when the corporation have deemed it for their advantage to enforce it by action, the other side being left without remedy when the corporation wish entirely to break and abandon it."

BOVILL, C.J. I am of opinion that the plaintiffs are entitled to the judgment of the Court, and that the rule should be discharged. The plaintiffs are a corporation established, according to their memorandum of association, for the purpose of acquiring collieries and mines in the south of Ireland, and working the same, and selling the produce, and generally of doing all such acts and things as should be necessary for the purpose of carrying out the objects of their association or any of them. This company, therefore, is in the nature of a trading company. The mode of carrying on their business is defined in article 4 of the memorandum of association; and the duties of the directors are defined by article 77. Subject, therefore, to exceptions which do not apply to this case, this is a corporation established for carrying on business under the control and management of the directors. The contract declared upon is admitted to have been made by the directors with the defendant. The objection is, that it is not under the corporate seal of the company; and it is contended on the defendant's behalf, that, by reason of the absence of a seal, there is no mutuality, that the plaintiffs are not bound by it, and therefore are not entitled to sue upon the contract. It appears further that the contract had been partly performed, and that the company were ready and willing to perform the rest. It had in fact been adopted and acted upon by

(1) 16 Q. B. 229, 237; 20 L. J. (Q.B.) 174. (2) 5 M. & Gr. 131.

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both parties. The objection is entirely a technical one; but, though technical, if it be in accordance with law, the Court is bound to give effect to it. Originally all contracts by corporations were required to be under seal. From time to time certain exceptions were introduced, but these for a long time had reference only to matters of trifling importance and frequent occurrence, such as the hiring of servants, and the like. But, in progress of time as new descriptions of corporations came into existence, the Courts came to consider whether these exceptions ought not to be extended in the case of corporations created for trading and other purposes. At first there was considerable conflict; and it is impossible to reconcile all the decisions on the subject. But it seems to me that the exceptions created by the recent cases are now too firmly established to be questioned by the earlier decisions, which, if inconsistent with them, must I think be held not to be law. These exceptions apply to all contracts by trading corporations entered into for the purposes for which they are incorporated. A company can only carry on business by agents,—managers and others; and if the contracts made by these persons are contracts which relate to objects and purposes of the company, and are not inconsistent with the rules and regulations which govern their acts, they are valid and binding upon the company, though not under seal. It has been urged that the exceptions to the general rule are still limited to matters of frequent occurrence and small importance. The authorities, however, do not sustain that argument. It can never be that one rule is to obtain in the case of a contract for 50*l.* or 100*l.*, and another in the case of a contract for 50,000*l.* or 100,000*l.* I will in the first instance refer to the case of *Henderson* v. *Australian Royal Mail Steam Navigation Company* (1), where, though one of the learned judges somewhat differed as to the application of the modern rule, yet all affirmed its existence as well as its propriety. Wightman, J., said: "I adhere to the opinion which I expressed in *Clarke* v. *Cuckfield Union* (2), 'that the general rule that a corporation aggregate cannot contract except by deed, admits of an exception in cases where the making of a certain description of contracts is necessary

(1) 5 E. & B. 409; 24 L. J. (Q.B.) 322. (2) 1 Bail C. C. 85; 21 L. J. (Q.B.) 349.

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and incidental to the purposes for which the corporation was created.'" And, after adverting to the ancient rule and to the earlier and more trifling instances of its relaxation, he goes on: "But, in later times, the decisions have sanctioned a much more extensive relaxation, rendered necessary in consequence of the general establishment of trading corporations. The general result of those cases seems to me to be, that, whenever the contract is made with relation to the purposes of the corporation, it may, if the corporation be a trading one, be enforced, though not under seal." And Erle, J., agreed, "on the ground that the contract was made for a purpose directly connected with the object of the incorporation," viz., the carrying on trade. Further on, the same learned judge says: "I cannot think that the magnitude or the insignificance of the contract is an element in deciding cases of this sort. No doubt, when the exception originated, it was applied only to small matters, such as the appointment of servants, being all that municipal corporations required. But, as soon as it became extended to trading corporations, it was applied to drawing and accepting bills to any amount; and this shews that insignificance is not an element. Neither, I think, is frequency. The first time a company makes a contract of any kind, that contract must have been unprecedented. The question is, I think, whether the contract in its nature is directly connected with the purpose of the incorporation." And Crompton, J., agreed in the principles laid down by the other two judges, but seemed to doubt whether it would not have been more proper to decide in conformity with some of the earlier cases in the Exchequer. But he says: "I perfectly agree in the principles laid down by my Brothers, and more especially I concur in that important principle suggested in *Broughton* v. *Manchester Waterworks Company* (1), that a modern incorporation incorporated for trading purposes may make binding contracts in furtherance of the purposes of their corporation, without using their seal." Lord Campbell was not present when that case was decided. But, in the following year, reference being made to it in a case of *Reuter* v. *Electric Telegraph Company* (2), his Lordship said: "I was not a party to that judgment; but I highly approved of it. The decision in it must, at all events, be

(1) 3 B. & A. 1.

(2) 6 E. & B. 341; 26 L. J. (Q.B.) 46.

binding on us." We have been much pressed by several cases in the Court of Exchequer. But, in *Australian Royal Mail Steam Navigation Company* v. *Marzetti* (1),—a case which occurred a few days after the case first mentioned,—the rule I have referred to was unanimously adopted. "It is now perfectly established," said Pollock, C.B., "by a series of authorities, that a corporation may with respect to those matters for which they are expressly created deal without seal. This principle is founded on justice and public convenience, and is in accordance with common sense." And Martin, B., said: "The case of *Fishmongers' Company* v. *Robertson* (2) is precisely in point, and, if it were not, good sense would lead us to the same conclusion." These principles are now too firmly settled to be shaken. The case of *London Dock Company* v. *Sinnott* (3) is distinguishable, on the ground which was alleged and adopted by the Court, viz., that it was not a contract of a mercantile character; it was not a contract for work to be done by the defendant for the company, but a contract to enter into another contract. At all events, if it is not distinguishable, it is contrary to the other cases; and it certainly was not intended to throw any doubt upon them.

In most cases, a trading company must carry on its business by means of agents; and in those cases there is an implied authority in the agents to make contracts on behalf of the company in the ordinary course of business. The business of a trading corporation could not otherwise be carried on. In the present case it does not seem to me to be necessary to go the length of relying upon the general exception to which I have adverted, inasmuch as the very constitution of the company is that the directors should have power to make contracts such as was made here. In pursuance of the 77th article of the memorandum of association, the directors have carried on the business of the company and have entered into this contract. Mr. Day says there is nothing in the articles of association to dispense with the ordinary rules of the common law or with the act of parliament. But I do not assent to that remark. The memorandum and articles of association are required by the Companies Act, 1862, 25 & 26 Vict. c. 89. The provisions on the subject are con-

(1) 11 Ex. 228; 24 L. J. (Ex.) 273.
(2) 5 M. & G. 131.
(3) 8 E. & B. 347; 27 L. J. (Q.B.) 129.

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tained in Part I. The 14th section provides that the memorandum of association may, in the case of a company limited by shares, and shall, in the case of a company limited by guarantee or unlimited, be accompanied, when registered, by articles of association signed by the subscribers to the memorandum of association, and prescribing such regulations for the company as the subscribers to the memorandum of association deem expedient: and the articles may adopt all or any of the provisions contained in Table A. in the first schedule thereto. And, when we refer to Table A., we find that one of the matters with regard to which the articles may make regulations is the powers of the directors. Article 55 is as follows:—"The business of the company shall be managed by the directors, who may pay all expenses incurred in getting up and registering the company, and may exercise all such powers of the company as are not by the foregoing act, or by these articles, required to be exercised by the company in general meeting, subject nevertheless to any regulations of these articles, to the provisions of the foregoing act, and to such regulations, being not inconsistent with the aforesaid regulations or provisions, as may be prescribed by the company in general meeting." By s. 15 of the act, it is enacted that, in the case of a company limited by shares, if the memorandum of association is not accompanied by articles of association, or in so far as the articles do not exclude or modify the regulations contained in Table A., the last-mentioned regulations shall, so far as the same are applicable, be deemed to be the regulations of the company in the same manner and to the same extent as if they had been inserted in articles of association, and the articles had been duly registered." This is a quasi incorporation under the act and subject to its provisions. If there had been no articles of association, those given in the schedule would govern its dealings. By s. 16 it is provided that the articles of association, when registered, "shall bind the company and the members thereof to the same extent as if each member had subscribed his name and affixed his seal thereto, and there were in such articles contained a covenant on the part of himself, his heirs, executors, and administrators, to conform to all the regulations contained in such articles, subject to the provisions of this act." This is the constitution of the company itself by which all its

members are bound. I am of opinion, therefore, that the directors were authorized to make the contract in question by force of the act of parliament and of the articles of association, and that there are no provisions in either which required it to be under seal. Upon the general ground therefore I first adverted to, as well as upon the latter and more limited ground, I am of opinion that the contract entered into by the directors with the defendant in this case was valid without seal.

BYLES, J. I am of the same opinion. It is impossible to reconcile all the dicta upon this subject. It would be difficult, perhaps, to reconcile all the decisions. But I think this is a very plain case. The company are not defendants in the action. The defendant is a natural person. He has made a contract with the company which clearly would bind him if he had received the consideration. He has received 200*l.* and 300*l.* on account; and he would have received the rest of the money if he had performed his contract. The money he has received he is entitled to keep, unless the company has some equitable right to recover it back. His objection to the maintenance of this action would have been equally good if he had been paid the whole 1500*l.* It is very like the case of *Fishmongers' Company* v. *Robertson* (1), where the company were held entitled to sue upon a contract not under seal, where the whole had been executed on their part. It is true that that case provoked an expression of dissatisfaction from Lord Campbell, C.J., in *Copper Miners' Company* v. *Fox* (2): but that case did not raise the point: the plaintiffs were a company incorporated for the purpose of dealing in copper; and the contract sued upon was not ancillary to that purpose. Opposed to this, however, is the observation of Martin, B., in *Australian Royal Mail Steam Navigation Company* v. *Marzetti* (3),—"The case of *Fishmongers' Company* v. *Robertson* (1) is precisely in point; and, if it were not, good sense would lead us to the same conclusion. It cannot be supposed that, where a corporation has done everything they were bound to do, and the other party has obtained the money, the latter is to be at liberty to break his con-

(1) 5 M. & G. 131.
(2) 16 Q.B. 229; 20 L.J.(Q.B.)174.
(3) 11 Ex. 228, 235; 24 L.J.(Ex.) 273.

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tract." There is, therefore, the authority of the Court of Exchequer, which I was not aware of before, for the position laid down in *Fishmongers' Company* v. *Robertson*. (1) The observation of Lord Campbell, C.J., in *Copper Miners' Company* v. *Fox* (2) was certainly extrajudicial: the objection there was not the want of a mere formal act; but the contract itself was entirely out of the scope of the company's incorporation. My Lord has already referred to the articles of association of this company, which necessarily imply that they were to have machinery for the working of their mines. Upon this ground, therefore, independently of the other and more general ground, I think the plaintiffs are entitled to retain their verdict.

MONTAGUE SMITH, J. I am of the same opinion. The general rule, no doubt, is, that a corporation contracts under seal. But, from very early times, exceptions have been allowed in the case of municipal and ecclesiastical corporations, to enable them, without the formality of a seal, to transact matters of minor importance and of daily occurrence. In the case of trading corporations, these exceptions have step by step been extended, and have now grown larger than the rule. The modern doctrine, as I understand it, is, that a company which is established for the purpose of trading may make all such contracts as are of ordinary occurrence in that trade without the formality of a seal, and that the seal is required only in matters of unusual and extraordinary character which are not likely to arise in the ordinary course of business. In *Dunstan* v. *Imperial Gas Light Company* (3), which was decided at a time when trading companies were becoming of great importance, Lord Tenterden says: "I wish to be understood as by no means deciding the question whether third persons who may sell coals or other materials to the company, or who may be employed by them as servants or workmen, may or may not maintain an action against them for remuneration, though the contract was not under seal. This is a corporation established for the purpose of carrying on trade and manufactures, and may, therefore, differ from others as to its powers of contracting, and its

(1) 5 M. & G. 131. (2) 16 Q. B. at p. 237.
(3) 3 B. & Ad. 125.

remedies upon contracts relating to the purposes for which the company is formed." And Taunton, J., said: "We are not called upon to decide the absolute question whether a corporation has the power of contracting otherwise than under seal." This shews the inclination of the minds of these two learned judges, both of whom were especially conversant with corporation law. In *Henderson* v. *Australian Royal Mail Steam Navigation Company* (1), all the judges adopt the rule suggested in *Dunstan* v. *Imperial Gas Light Company* (2), and hold it to be law; Wightman, J., who was an extremely cautious judge, saying: "The result of the cases seems to me to be, that, whenever the contract is made with relation to the purposes of the incorporation, it may, if the corporation be a trading one, be enforced though not under seal." The rest of the Court lay down the rule in equally plain and simple terms: and I entirely agree with them. Applying the principle of that case to the present,—a pumping-engine was a thing proper and necessary for the purposes for which this company was incorporated, and therefore the contract for it was enforceable though not under seal. This decision, no doubt, conflicts with *East London Waterworks Company* v. *Bailey*. (3) The majority of the Court of Queen's Bench in effect treat that case as contrary to the current of decisions. The result of those decisions and the present is that *East London Waterworks Company* v. *Bailey* (3) can no longer be considered to be law.

Rule discharged.

Attorney for plaintiffs: *W. B. Jones.*
Attorneys for defendant: *Tucker & New.*

(1) 5 E. & B. 409; 24 L. J. (Q.B.) 322.
(2) 3 B. & Ad. 125.
(3) 4 Bing. 283.

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May 12.

[IN THE EXCHEQUER CHAMBER.]

GRILL *v.* THE GENERAL IRON SCREW COLLIERY COMPANY, LIMITED.

Ship and Shipping—Construction of Bill of Lading—Exception of Barratry and Accidents of the Seas, &c.—Negligence—Merchant Shipping Act, 1854 (17 & 18 *Vict. c.* 104), *s.* 299.

The plaintiff shipped goods on board the defendants' vessel, *Black Prince*, under a bill of lading which contained an exception of, amongst other things, "barratry of the master and mariners," and "accidents or damage of the seas." In the course of the voyage the *Black Prince*, meeting a vessel called the *Araxes* under circumstances which rendered it the duty of the *Black Prince* to port her helm, neglected to do so, and the result was that the *Black Prince*, with the plaintiff's goods on board, was run down and totally lost:—

Held,—affirming the judgment of the Common Pleas,—that the conduct of the master, though a "wilful default" by s. 299 of the Merchant Shipping Act, 1854, did not amount to "barratry," nor was the loss a loss "by accidents or damage of the seas," within the exception in the bill of lading.

The judge left it to the jury to say whether the collision was caused by the negligence of the defendants' crew, and whether there was any want of ordinary care on the part of the *Araxes* by the exercise of which the collision might have been avoided:—

Held, a proper direction, and that he was not bound to leave it to them to say whether the persons in charge of the *Araxes* might not have mitigated the calamity by stopping or backing when they found a collision inevitable.

APPEAL against a decision of the Court of Common Pleas discharging a rule obtained by the defendants to enter a verdict for them or for a new trial. (1)

1. The plaintiff was a merchant at Messina. The defendants were the owners of a line of steamers trading between this country and the Mediterranean, and among others of a steamship called the *Black Prince*.

2. The plaintiff, on the 27th of October, 1860, shipped at Messina on board the *Black Prince* goods to be carried thence to London, under a bill of lading which contained the following exception:—"The act of God, the Queen's enemies, pirates, robbers, thieves, barratry of master or mariners, restraint of princes and rulers, fire, accident or damage from machinery, boilers, steam, or from other goods by contact, sweating, leakage, or otherwise, and accidents or

(1) Law Rep. 1 C. P. 600.

damage of the seas, rivers, and steam-navigation of whatever nature or kind soever excepted."

3. The *Black Prince* sailed in due course from Messina bound for London, and in the night of the 8th of November, 1860, when off the coast of Portugal, and bound northwards, met the steamship *Araxes* proceeding to the southward.

4. The two vessels were approaching each other in such a way as to render a collision probable if both vessels held their respective courses, and under such circumstances as to make it the duty of the *Black Prince* to port her helm pursuant to s. 296 of the Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104.

5. The *Black Prince*, however, instead of porting her helm, put it a starboard, and the consequence of this was that the two vessels came into collision, and the *Black Prince* went down with all her cargo on board, including the plaintiff's goods.

6. There were no such circumstances as to justify the *Black Prince* in starboarding her helm.

7. It appeared by the evidence that several minutes elapsed between the collision and the sinking of the *Black Prince* and her cargo; and that the *Araxes* obeyed her helm very readily, and could slow and stop her engines with great ease, the engineer having power to stop her in about a minute, and to bring back-way on her in about three minutes.

8. It further appeared by the evidence that some four or five minutes before the collision the *Black Prince's* course was seen from the *Araxes*, and orders given to the helmsman of the *Araxes* to put his helm a-port, and then hard a-port. Orders were also given to stop the engines, and the engines were stopped. One of the witnesses for the plaintiff stated that the stoppage of the engines and the collision were simultaneous. Another of the plaintiff's witnesses (the mate of the *Araxes*) stated that the engines were stopped about a minute before the collision; and a third (the engineer of the *Araxes*) said he thought they were stopped about three minutes before the collision, but that he could not say that it might not have been only a minute.

9. On behalf of the defendants it was contended that the loss was within the excepted perils, and also that under the circumstances the defendants were protected by s. 299 of the Merchant

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Shipping Act, 1854; and further, that, even assuming the collision to have been caused by the negligence of the *Black Prince*, the loss of the plaintiff's goods was not caused wholly by the alleged negligence of the defendants' servants, but was in part attributable to the *Araxes* not having slackened or backed when the collision was about to take place.

10. The Lord Chief Justice reserved to the defendants leave to move on the question raised as to the bill of lading, and left it to the jury to say whether the collision was caused by the negligence of the defendants' crew, telling them, if they thought not, to find for the defendants; and also whether there was want of ordinary care on the part of the *Araxes* by the exercise of which the collision might have been avoided, telling them, if they thought so, to find for the defendants, but otherwise for the plaintiff. He further ruled that, if the collision was caused by negligence on the part of the *Black Prince*, the loss would not be within the exceptions in the bill of lading, and that, for the purposes of this case, there was no distinction between negligence and gross negligence.

11. The jury found that there was no want of ordinary care on the part of the *Araxes*, and that there was negligence on the part of the *Black Prince* which caused the collision; and under the direction of his lordship a verdict was entered for the plaintiff for 1220*l*.

A rule to enter a verdict for the defendants, or for a new trial, was afterwards obtained, and was discharged.

Sir G. Honyman, Q.C. (*Sir J. B. Karslake, Q.C., A.G.*, with him), for the defendants. It is perfectly competent to a carrier by water to limit his liability; and by this bill of lading the defendants have expressly stipulated that they shall not be responsible for "barratry of master or mariners." By s. 296 of the Merchant Shipping Act, 1854, it was the duty of both vessels under the circumstances to port their helms. And s. 299 (1) enacts that, "in case any damage to person or property arises from the non-observance by any ship of any of the said rules, such damage shall be deemed to have been occasioned by the *wilful default* of

(1) Which, though since repealed by the 25 & 26 Vict. c. 63, s. 2, was in force at the time this collision occurred.

the person in charge of the deck of such ship at the time, unless it is shewn to the satisfaction of the Court that the circumstances of the case made a departure from the rule necessary." The case finds that the *Black Prince* ought to have ported her helm, and that there were no circumstances to justify her not doing so: the collision, therefore, must be deemed to have been occasioned by wilful default. That clearly amounts to barratry, within the definition given by Lord Hardwicke in *Lewin* v. *Snaps* (1), and by Lord Ellenborough in *Earle* v. *Rowcroft.* (2) See also 3 Kent's Comm. 305; Arnould on Insurance, 3rd ed. 712.

[BLACKBURN, J. An act may be wilful, without amounting to barratry. The statute never could have meant to declare this to be a wilful default in the sense of excusing the owners from liability to an action.

BRAMWELL, B. It was not meant to apply to a collateral issue; but only where the question of collision is in issue.]

This is an action brought in consequence of the collision.

[BLACKBURN, J. This question arose in the case of *The Seine* (3), where it was held that the owners of a steamship were responsible for damage caused by the act of the master in not observing the 297th section of the Merchant Shipping Act, 1854, which prescribes keeping to the starboard side of the mid-channel, notwithstanding s. 299.]

If the Court are of opinion that s. 299 does not apply to conduct of the master as between himself and his owners, it will be useless to refer to authorities.

[KELLY, C.B. We are all decidedly of that opinion.]

Then, this was a loss within the exception of "accidents or damage of the sea, of whatever nature or kind soever." These words are large enough to cover a loss by collision. A collision may be the result of default on the part of both or either of the vessels, or it may be pure accident. The object of the exception is to preclude inquiry on the subject. That it is competent to a carrier to so restrict his liability, is clear from *Austin* v. *Manchester, &c., Railway Company.* (4) There, the company carried a

(1) Postlethwaite's Dict. 177, tit. Assurance.

(2) 8 East, 126.

(3) Swab. Adm. R. 411.

(4) 10 C. B. 454; 21 L. J. (C.P.) 168.

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valuable horse of the plaintiff under a contract which provided that "the company will not be responsible for any damages, *however caused*, to horses, &c., travelling upon their railway or in their vehicles;" and it was held that this exonerated them from liability where, through neglect of their servants to grease a wheel, it caught fire, and the horse was injured. Cresswell, J., says: "Giving the words the most limited meaning, they must apply to all risks, of whatever kind and however arising, to be encountered in the course of the journey; one of which undoubtedly is, the risk of a wheel taking fire, owing to a neglect to grease it." *Carr* v. *Lancashire and Yorkshire Railway Company* (1) is to the same effect. So here, one of the ordinary risks is the risk of a collision through non-observance of the prescribed sailing regulations.

[BLACKBURN, J. The words of exception are not so extensive as in that case. In *Phillips* v. *Clark* (2), the Court of Common Pleas held that an exception of liability of the ship-owner for leakage and breakage did not apply where the leakage or breakage was the result of the defendants' negligence.

BRAMWELL, B. In order to succeed, you must be prepared to shew that that case and the case of *Lloyd* v. *General Iron Screw Collier Company* (3), are not law.]

It is competent to this Court to review those decisions. There is nothing unreasonable in a ship-owner, having once put on board a competent captain and crew, stipulating that he will not be responsible for accidents arising from their negligence, the owner of the goods having a remedy against the underwriters. Then, the Lord Chief Justice ought to have left it to the jury to say whether, though the collision might have been occasioned by negligence on the part of those in charge of the *Black Prince*, the loss of the plaintiff's goods might not have been averted if the master of the *Araxes* had slackened speed or backed his engines.

[KELLY, C.B. There is no finding that the omission to slacken the speed or to back the engines of the *Araxes* contributed to the

(1) 7 Ex. 707; 21 L. J. (Ex.) 261.
(2) 2 C. B. (N.S.) 156; 26 L. J. (C.P.) 168.
(3) 3 H. & C. 284; 33 L. J. (Ex.) 269.

loss. Nor was there any evidence of experts or others to warrant the Chief Justice in putting that point to the jury.]

Sir R. Collier, Q.C. (*C. J. Brett* with him), for the plaintiff, was not called upon.

KELLY, C.B. With respect to the question whether a loss by the negligence of the defendants' servants is within the exception in the bill of lading, I am of opinion that is concluded by authority. The cases of *Phillips* v. *Clark* (1), in the Common Pleas, and *Lloyd* v. *General Iron Screw Collier Company* (2), in the Exchequer, are expressly in point; and we ought not to overrule those decisions, though sitting in a Court of Error, unless we think them to be opposed to some principle of law or to common sense. I agree with my Brother Channell that, independently of all authority, the loss in this case is not within the exception. If ship-owners wish to except losses resulting from the negligence of themselves or their servants, they must do so by express language, though they may thereby make the bill of lading repugnant. To shew how impossible it is to construe the exception in this bill of lading in the way contended for by the defendants, I need only refer to what Cresswell, J., says in *Phillips* v. *Clark*. (1) The question there arose upon a bill of lading which contained a stipulation that the owner was not to be accountable for leakage and breakage: and that learned judge says: "Ordinarily, the master undertakes to take due and proper care of goods intrusted to him for conveyance, and to stow them properly; and he is responsible for leakage and breakage. Here he expressly stipulates not to be accountable for leakage or breakage, leaving the rest as before." That is to say, the ordinary obligation of the owner to take due and proper care of the goods was left untouched by the exception. It appears to me, and, I believe, to the rest of the Court, that the loss in question arising from negligence is not within the exception, and that the liability of the owners is only to be excluded by express words.

(1) 2 C. B. (N.S.) 156; 26 L. J. (C.P.) 168.

(2) 3 H. & C. 284; 33 L. J. (Ex.) 269.

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As to the other question raised, it is necessary to look at what was the substance of the case at the trial. It appears that a collision having taken place between the *Araxes* and the *Black Prince*, and that collision having been the cause of the loss of the plaintiff's goods, the contention on the part of the defendants was, that, even supposing their servants to have been guilty of negligence, the negligence of the crew of the *Araxes* might have contributed to that loss. The learned judge left it to the jury to say whether the collision which caused the loss of the goods was occasioned by the negligence of the crew of the defendants; and, if they found that it was, then the only remaining question was whether there was any want of care on the part of the crew of the *Araxes* but for which the collision might have been avoided. It is now said that, though the crew of the *Araxes* might not have been guilty of negligence in not starboarding her helm when the collision was seen to be inevitable, she might have backed, and so materially mitigated the loss. But I think the jury could not have found, as they did, that there was no want of care on the part of those on board the *Araxes*, if they thought that they might, by backing or otherwise, have avoided the loss of the plaintiff's goods. Looking at all the facts of the case, I think the jury must be taken to have found that there was no want of care on the part of the crew of the *Araxes*, and that the loss of the plaintiff's goods was solely occasioned by the negligence of the defendants' servants. Upon these grounds I think the charge of the learned judge to the jury was right, and that the decision of the Court below should be affirmed.

BRAMWELL, B. I only wish to say a word upon the last point. The learned judge was not bound to leave it to the jury to say whether the loss might not have been mitigated by the *Araxes* backing when the collision was found to be inevitable, or after it had taken place. There was no evidence of it. Upon the evidence which was given, I doubt whether the *Araxes* ought to have backed. Although those on board of her saw the course of the *Black Prince*, I cannot undertake to say that they were wrong in not backing. They might fairly have supposed that those on board that vessel would have done their duty, or that by holding on they might

have gone clear of her. Who can say what would have happened?

BLACKBURN, J., and CHANNELL, B., concurred.

Judgment affirmed.

Attorneys for plaintiff: *Pritchard & Sons.*
Attorneys for defendants: *Thomas & Hollams.*

END OF EASTER TERM.

CASES

DETERMINED BY THE

COURT OF COMMON PLEAS

AND BY THE

COURT OF EXCHEQUER CHAMBER,

ON ERROR AND APPEAL FROM THE COURT OF COMMON PLEAS,

IN AND AFTER

TRINITY TERM, XXXI VICTORIA.

1868
May 27.

THE IRON SHIP COATING COMPANY, LIMITED, *v.* BLUNT.

Company—Construction of Articles of Association—Disqualification of Directors—Secretary.

By the articles of association of a joint-stock company it was provided that any director who should accept or hold any other office under the company than that of manager, should thereupon be disqualified from being and should cease to be a director. A. had been appointed secretary at a salary, and whilst secretary he was elected a director, and appointed upon a committee to exercise certain powers of the directors: from the time of his election he received salary as a committee-man, but ceased to receive salary as secretary, though he continued to perform all the duties of the office:—

Held, that A. did not hold an "office" under the company, so as to disqualify him from being party as a director to the making of a call.

DECLARATION for a call. Plea, never indebted.

At the trial before Bovill, C.J., at the sittings in London after last Michaelmas Term, the following facts were proved:—The plaintiffs were a company incorporated under the Companies Act, 1862 (25 & 26 Vict. c. 89). By the articles of association it was, inter alia, provided as follows:—

Clause 69. "Every director who shall cease to possess the

requisite number of shares, or shall become bankrupt or insolvent or compromise with his creditors, or shall be declared a lunatic, or become of unsound mind, or shall absent himself from the meetings of the directors during a period of three calendar months consecutively, without special leave of absence from the directors, or shall accept or hold any other office under the company than that of manager, shall thereupon be disqualified from being and shall cease to be a director, and the vacancy thereby occasioned may be filled up in the manner hereinbefore mentioned; but all acts done by such person as a director, or by the board, or by any committee of which he may be a member, before the discovery of such disqualification, either solely or with other directors, shall be as binding on him and on the company and the directors and officers thereof, and on all persons whomsoever, as if such person had been duly qualified."

Clause 72. "Any three of the number of directors shall constitute a quorum, unless they shall otherwise decide."

Clause 116. "Mr. C. Grabham shall be the first secretary, at such salary as the directors may from time to time determine upon."

Clause 118. "General M'Killop, R.N., shall be the manager and superintendent of the works and business of the company, and for performing the duties of his office shall receive a salary of 600*l.* per annum."

On the 7th of July, 1866, at a board meeting it was duly resolved that Mr. C. Grabham be elected a director, and that General M'Killop and Mr. Grabham should be a committee to exercise all the powers of the directors, except as to making calls and varying the capital; and that, for their services, General M'Killop should receive 200*l.* and Mr. Grabham 150*l.* per annum. The election of Grabham as a director was approved and confirmed at the next ordinary general meeting of the company held on the 15th of February, 1867.

Grabham ceased to receive salary as secretary from the time he was elected a director, but continued to act as secretary at the board meetings, no other secretary being appointed; and he received remuneration as a committee-man.

On the 22nd of November, 1866, three directors being present (one of whom was Grabham), it was resolved that a call of 5*l.* per

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share be made; and on the same day notice of the call was sent by post to all the shareholders, including the defendant,—the notice being signed "C. Grabham, Secretary."

On the 6th of May, 1867, a resolution was passed for a voluntary winding-up of the company under s. 129 of the Companies Act, 1862, and this action was brought by the liquidator, the defendant being on the list of contributories.

At the trial it was objected for the defendant, that the call was not duly made, Grabham, one of the three present at the board meeting at which it was made, being by clause 69 of the articles of association expressly disqualified from acting as a director.

The learned judge directed a verdict to be entered for the amount of the call and interest, leave being reserved to the defendant to move to enter a verdict for him if the Court should be of opinion that the call was not duly made.

Day, in Hilary Term last, obtained a rule nisi accordingly.

May 27. *Sir R. Collier, Q.C.*, and *Raymond*, shewed cause. The fact of Grabham being present as a director at the board meeting at which the call was made does not make the call bad. He had then ceased to be secretary,—salaried secretary, at all events. There are numerous cases to shew that, where a man accepts an office which is incompatible with one which he holds at the time, the former office is ipso facto vacated: per Littledale, J., in *Rex* v. *Tizzard* (1); *Rex* v. *Jones*. (2) In the last-mentioned case, which was that of a town-clerk, who also held the office of common councillor, Lord Tenterden said: "If the common-council had the power of fixing the town-clerk's salary, or of removing him, the offices would be incompatible." Here, the directors fixed the salary of the secretary, and they had a power of removing him. It is true that Grabham, though a director, continued to perform the functions of secretary; but he did not hold the office of secretary, or receive salary as secretary: and his acting in the capacity of honorary or gratuitous secretary could not make his acts as a director void.

(1) 9 B. & C. at p. 422. (2) 1 B. & Ad. 677.

[WILLES, J., referred to *Scadding* v. *Lorant* (1), where it was held that a rate for the relief of the poor, which is legally made in other respects, is not rendered invalid by the circumstance that some of the vestrymen who concurred in making it were vestrymen de facto and not de jure.]

If Grabham had refused to do the duties of secretary after the 7th of July, 1866, the directors could not have complained. Further, the consequences of any disqualification are entirely obviated by the latter part of clause 69, which makes all acts valid notwithstanding such disqualification.

Day, in support of the rule. The first question is whether Grabham had ceased to be secretary at the time the call was made. From the time of his original appointment, he performed all the duties of secretary, and in all respects appeared to be secretary, and he signed the notice of the call as secretary. He did not cease to be secretary when he was appointed director, and no other person was appointed secretary in his stead. He was clearly a person at that time holding an office under the company which rendered him incompetent to act as a director. The call therefore was made by two directors only, and was bad. (2)

BOVILL, C. J. The call in question was made on the 22nd of November, 1866, at a meeting of three directors of the company sitting as a board, one of them being Mr. Grabham. It is not disputed that the defendant is a shareholder, nor that the call was duly made, provided the three directors present at that meeting were qualified to act as directors. But it is said, on the part of the defendant, that Grabham was by the terms of clause 69 of the articles of association of the company disqualified from acting as a director, because he held an office under the company other than that of manager. It appears that Grabham was originally appointed the secretary of the company, and that he continued to be such secretary and to receive salary as such down to the 7th of July, 1866. At that time, the affairs of the company not

(1) 3 H. L. 418.

(2) Several other points which turned upon the construction of other clauses in the articles of association and upon the effect of other resolutions by the directors were urged in behalf of the defendant, but the Court expressed no opinion upon these points, and it is therefore unnecessary further to refer to them.

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IRON SHIP COATING CO. v. BLUNT.

being in a flourishing condition, a resolution was passed that Grabham be elected a director, and that General M'Killop and Grabham should be a committee to exercise all the powers of the directors, except as to making calls and varying the capital; and further that M'Killop should receive 200*l.* a year and Grabham 150*l.* a year for their services as committee-men. After that resolution, Grabham, as it seems to me, would have no claim on the company for salary as secretary: and in fact he never made any such claim. He ceased to be secretary from that time: and there was no evidence of any fresh appointment of him to that office. He became a director and also a committee-man. He did not therefore hold an office under the company within the meaning of clause 69. Being a director, he performed all the ordinary duties of a secretary; but his doing so did not disqualify him from acting as a director. I therefore think the call was duly made. That being so, it becomes unnecessary to consider the other points which were urged on behalf of the defendant. The rule must be discharged.

WILLES, J. I am of the same opinion. The true construction of clause 69 is this: it was intended to provide that any director accepting an office under the company, other than that of manager, should cease to be a director. That would be so if the offices of secretary and director were offices proper, as in the instances put in Com. Dig. Officer (B. 6), where it is laid down that "the grant of an office to one who has another office incompatible, is not good; for, the first office will thereby be void. As, if a forester, by patent for life be made justice in eyre of the same forest pro hâc vice, the office of forester will be void; for, it is incompatible, being subject to correction by the justices in eyre." Several other illustrations are there put: amongst them, that "the chief justice of C.B. cannot be prothonotary or clerk of the papers in the same Court." This is founded upon a principle which runs through the whole of the law, and is applicable to surrenders by implication. So here, the resolution making Grabham a salaried director must be taken to involve a resignation of the office of secretary. The fact of his having continued to perform the duties of secretary after he had ceased to be the paid servant of the company (which

is the only sense in which the word "office" is used in the clause of the deed relied on), really makes no difference. The true conclusion from the facts appears to be this, that, the company having fallen into a bad way, the secretary was content to give up his emoluments as secretary and become a director, upon an understanding that he would pro tempore continue to do all such acts as are required to be done by a secretary. As Lord Tenterden observes in *Rex* v. *Jones* (1), "there is nothing inconsistent in one member of a body noting down the acts of the body." I cannot help thinking that this is what the parties intended; and the articles well bear this construction.

MONTAGUE SMITH, J. I am entirely of the same opinion. After his election as director, Mr. Grabham did not hold an office within the disqualifying clause. He had ceased to be secretary in the sense of holding the office of secretary, so that the directors could command his services as of right. Not only did he cease to be secretary by the acceptance of an incompatible office, but he ceased in point of fact to be secretary. He simply took upon himself to do the acts which would have been done by a secretary, if his successor had been appointed.

Rule discharged.

Attorneys for plaintiffs: *Phillips & Son.*
Attorneys for defendant: *Tucker & New.*

(1) 1 B. & Ad. at p. 681.

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May 29.

IN THE MATTER OF A PLAINT IN THE COUNTY COURT OF KENT, BETWEEN BOOKHAM AND POTTER. EX PARTE ROGERS.

County Court; Practice—Attorney for the Party under 15 & 16 *Vict. c.* 54, *s.* 10 *—Retainer—Rule under* 19 & 20 *Vict. c.* 108, *s.* 43.

The 15 & 16 Vict. c. 54, s. 10, enacts that an attorney of a superior court, being an attorney acting generally in the action for the party, but not retained as advocate by the acting attorney, may appear for a suitor in the county-court. Upon a motion under the 19 & 20 Vict. c. 108, s. 43, calling upon the judge to shew cause why he should not hear a duly qualified attorney:—

Held, that it was for the judge to determine as matter of fact whether the applicant was or was not the attorney acting generally in the action for the party.

Semble, that the fact of an attorney being clerk to another attorney, does not disqualify him from appearing for a suitor in the county-court, provided he be the attorney acting generally in the action for the suitor.

J. Brown, Q.C., on behalf of Mr. Joseph Rogers, obtained a rule calling upon the judge of the county-court of Kent holden at Tonbridge, to shew cause why Mr. Rogers should not be heard as the attorney for the plaintiff on the trial or hearing of a plaint in the county-court, in which Bookham was plaintiff and Potter defendant.

The affidavit of Mr. Rogers, in support of the rule, was as follows:—

1. I was duly admitted an attorney of this Court in Michaelmas Term, 1836.

2. That I duly obtained my certificate to practise as an attorney and solicitor for this present year; and my name appears in the Law List for the present year as having taken out such certificate.

3. That I duly signed the roll of attorneys kept by the registrar of the said county-court of Kent holden at Tonbridge, on the 18th of May, 1855.

4. That I am now, and have been for upwards of twelve years past, a clerk to Mr. G. Stenning, an attorney practising at Tonbridge, during the whole of which time I have been allowed by him to practise and transact business as an attorney and solicitor for myself and on my own behalf.

5. That I was on the 6th of March last retained and instructed by James Bookham, as his attorney and solicitor, to conduct and

prosecute three several actions brought by Bookham against Richard Keeys, George Potter, and George Adams, respectively, in the county-court of Kent holden at Tonbridge, a copy of which retainer is hereunto annexed. (1)

6. That the action in which Bookham was the plaintiff and George Potter was the defendant came on to be heard on the 6th of March last, before John Lonsdale, Esq., the judge thereof.

7. That I appeared at such hearing as the attorney of and for Bookham in this action against Potter; but the judge refused to hear me as such attorney, on the ground that, though I was an attorney, I was only a clerk to Mr. Stenning, though I stated to the judge that I was retained by the plaintiff as his attorney in the action, and produced the retainer signed by him, but which retainer the judge declined to look at, and adjourned the cause to the next court.

8. That the fees and profits derived from the action, and to be derived by me as the attorney and solicitor of Bookham in the action, belong entirely to myself, and neither George Stenning nor any other person has any interest whatever in the same or any part thereof.

9. That the said George Stenning is not on the roll of attorneys kept by the registrar of the county-court at Tonbridge, and never has to my knowledge appeared therein as an attorney for any person or persons whomsoever.

10. That I have during the last ten years regularly practised in the county-court at Tonbridge as the attorney and advocate of suitors therein.

11. That, during the whole of such time, I have so practised in

(1) The retainer, which was a printed form, was as follows:—

"To Mr. Joseph Rogers, of Tonbridge, Kent, attorney-at-law.

"I, the undersigned, James Bookham, of Hever, in the county of Kent, miller and farmer, do hereby retain you as my attorney and solicitor to conduct three several actions brought by me in the county-court of Kent holden at Tonbridge, against Richard Keeys, George Potter, and George Adams, for the recovery of debts due from them respectively to me. And I do hereby authorize you as my attorney and solicitor to take all such proceedings, and generally to do in or concerning the premises as in your discretion you may deem to be necessary for the proper conduct of the matters aforesaid, and for which this shall be your sufficient warrant and authority. Dated this 6th day of March, 1868.

(Signed) "James Bookham."

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such court in my own name, receiving my instructions direct from such suitors, and acting generally as their attorney in the actions brought by and against them in such court.

Denman, Q.C., shewed cause. This rule assumes to be founded upon s. 43 of the 19 & 20 Vict. c. 108, which substitutes a motion for a mandamus. (1) This section was not intended to apply to a matter in which the judge has a discretion; *Clifton* v. *Furley* (2); *Re Corbett.* (3) Here, seeing probably that the retainer was given only on the day on which the plaint came on for trial, the judge came to the conclusion that Rogers was not entitled to be heard, inasmuch as he was not shewn to be "an attorney acting generally in the action" for the plaintiff, within the 15 & 16 Vict. c. 54, s. 10. *Reg* v. *Spooner* (4) is precisely in point. The Court of Queen's Bench there held that, if there be any evidence upon which the judge could form an opinion that the person claiming audience was not an attorney acting generally in the action for the party, they would not interfere.

Brown, Q.C., and *Biron*, in support of the rule. If Rogers was attorney in the cause for the plaintiff, the judge had no discretion: he was bound to hear him. The fact of his acting sometimes as clerk to another attorney is no disqualification.

[BOVILL, C.J. To entitle him to be heard, he must be "an attorney acting generally in the matter for the party." The affidavit does not allege that Rogers was so acting; and the date of the retainer shews that he was not. The intention of the statute was to prevent attorneys from acting as advocates in the

(1) It enacts that "No writ of mandamus shall henceforth issue to a judge or an officer of the county-court for refusing to do any act relating to the duties of his office; but any party requiring such act to be done may apply to any superior court,* upon an affidavit of the facts, for a rule calling upon such judge or officer of a county-court, and also the party to be affected by such act, to shew cause why such act should not be done; and if after the service of such rule good cause shall not be shewn, the superior court may by rule direct the act to be done, and the judge or officer of the county-court, upon being served with such rule or order, shall obey the same on pain of attachment."

(2) 31 L. J. (Ex.) 170.

(3) 4 H. & N. 452; 28 L. J. (Ex.) 254.

(4) 18 L. T. 325.

* "Or a judge thereof" expunged by 21 & 22 Vict. c. 74.

county-court. This sort of retainer is calculated to produce the very state of things which was meant to be guarded against.]

There is no pretence for saying that Rogers was "an attorney retained as an advocate for another attorney." It is quite immaterial at what stage of a cause the attorney is retained. There is no necessity for employing the services of an attorney until the day of trial.

BOVILL, C.J. The rule was granted in this case with a view to raise a very important question, viz. whether a gentleman who is upon the roll of attorneys of one of the superior courts, and who has signed the roll of attorneys in the county-court under the 88th rule of the County-Court Rules, 1857, is precluded from appearing as attorney for a suitor in the county-court by reason of his acting as managing-clerk to another attorney. Although it turns out that that point is not raised by the affidavit upon which the rule is founded, I think it right to say that in my opinion there is nothing in the fact of a gentleman being clerk to another to prevent his being heard as the attorney in the cause. He must, however, satisfy the requirement of the statute (15 & 16 Vict. c. 54, s. 10), by shewing that he is the attorney acting generally in the cause. At first sight, it appeared from the affidavit that the judge refused to hear Mr. Rogers because he was clerk to Mr. Stenning. Upon looking more closely at it, that seems to be a mistake. When a party comes and asks us to interfere with a decision of a county-court, he must satisfy us that the judge was clearly wrong in the decision which he arrived at, or rather that he has not decided on the question submitted to him. We cannot reverse his judgment upon a matter of fact. The statute requiring the attorney to be "acting generally in the action" for the party before he can claim to be heard, we must see if this gentleman has brought himself within that category. If the date of the retainer had been mentioned when the rule was moved for, I should have hesitated before I granted it. But, on seeing the retainer in the printed form, and seeing that it is signed only on the morning of the trial, I am clearly of opinion that the applicant has not brought his case within the act so as to justify us in interfering. It ought to have been made clear upon the affidavit that

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the judge refused to do some act relating to the duties of his office. Who is to determine whether or not the attorney is acting generally in the action? The judge before whom the party appears has the best means of determining that question. If he had declined to entertain the question, then undoubtedly the party might apply to the superior court for a rule to compel him to do so. But this Court has no power to compel him to determine the matter in any particular way. I cannot discover from the affidavit that the judge refused to entertain the question of fact. On the contrary, he seems to have held that Mr. Rogers was acting merely as clerk to Mr. Stenning, and was not engaged generally as attorney in the cause. Upon both grounds, therefore, I am of opinion that the application fails.

Willes, J. I am entirely of the same opinion.

Montague Smith, J. I am of the same opinion. Under s. 10 of the 15 & 16 Vict. c. 54, the only attorney who is entitled to be heard in the county-court is the attorney acting generally in the action for the party. The judge is bound to determine that question. Here, the judge finds that Mr. Rogers was acting as clerk to Mr. Stenning. If he was acting as attorney generally in the action, the fact of his being clerk to another attorney would not preclude his right to be heard. But the matter of fact was for the consideration and determination of the judge. If he found that he was not acting as the attorney generally in the action, his refusal to hear him was quite right. It is enough to say that the affidavit has not brought the matter so clearly before us as to enable us to say that the judge was wrong.

Denman, Q.C., intimating that he was not instructed to ask for costs,

Rule discharged, without costs.

Attorney for applicant: *G. Stenning.*

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June 1.

Negligence—Breach of Duty—Statement of Cause of Action—Pleading.

Declaration that the defendant wrongfully, negligently, and improperly hung a chandelier in a public-house, knowing that the plaintiff and others were likely to be therein and under the chandelier, and that the chandelier unless properly hung was likely to fall upon and injure them; and that, the plaintiff being lawfully in the public-house, the chandelier fell upon and injured him:—

Held, on demurrer, that the declaration was bad, as it did not disclose any duty by the defendant towards the plaintiff for the breach of which an action could be maintained.

DECLARATION that the defendant wrongfully, carelessly, negligently, and improperly hung a chandelier in a public-house, knowing that the plaintiff and others were likely to be in the said public-house and near and under the chandelier, and that the chandelier unless carefully and properly hung was likely to fall upon and injure the plaintiff or others, and without giving any notice or warning to the plaintiff of the dangerous way in which the chandelier was hung, so as to enable him to protect himself; and that, by means of the premises, and of the carelessness, negligence, wrongful, and improper conduct, of the defendant in that behalf, the chandelier fell upon the plaintiff whilst he was lawfully in the public-house and unconscious of the danger, and greatly hurt him, &c.

Demurrer, on the ground that the declaration did not disclose any duty by the defendant to the plaintiff for breach of which an action would lie. Joinder.

J. Brown, Q.C. (*Joyce* with him), in support of the demurrer. The declaration discloses no cause of action. It does not shew what character the plaintiff filled,—whether he was the proprietor of the house, or a servant, or a tradesman employed to put up the chandelier. He may have been a guest, or a customer, or a member of the family of the proprietor of the house, or one of his servants. If this be put as a breach of duty in the performance of a contract, the answer is that for anything that appears the plaintiff is a stranger to the contract: *Winterbottom* v. *Wright* (1);

(1) 10 M. & W. 109.

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Alton v. *Midland Railway Company*. (1) In order to avoid that difficulty, the declaration alleges that the defendant wrongfully and negligently hung the chandelier, and knew of its dangerous state. The proprietor of a shop where there is a dangerous hole is responsible if a person lawfully coming there falls through and is hurt. The liability there rests upon the principle laid down in *Parnaby* v. *Lancaster Canal Company*. (2) But there is no case in which such an action has been maintained against any other than the proprietor of the house. The general principle is recognized and acted upon in *Southcote* v. *Stanley*. (3) It is consistent with this declaration that the plaintiff may have been a visitor, as in that case. A declaration of this sort, says Willes, J., in *Gautret* v. *Egerton* (4), "ought to state the facts upon which the supposed duty is founded, and the duty to the plaintiff with the breach of which the defendant is charged. It is not enough to shew that the defendant has been guilty of negligence, without shewing in what respect he was negligent, and how he became bound to use care to prevent injury to others."

Kempe, contrà. The declaration is good. The law casts a duty upon a man who undertakes to do something from which injury may result to another, to exercise reasonable care and skill in doing it. For a breach of that duty resulting from his negligence, he is responsible to any person who thereby sustains injury. It is upon this principle that *Barnes* v. *Ward* (5) and *Indermaur* v. *Dames* (6) were decided.

BOVILL, C.J. I am of opinion that this declaration does not disclose any cause of action. The case seems to me to fall within the principle and the reasons given in *Winterbottom* v. *Wright*. (7) No duty of a public nature is shewn. Assuming that for this purpose a public-house is to be treated as an inn,—which upon the statements in this declaration I think we can hardly assume,—it is not shewn in what capacity the plaintiff was there: it is merely

(1) 19 C. B. (N.S.) 213; 34 L. J. (C.P.) 292.

(2) 11 A. & E. 223; and see *Indermaur* v. *Dames*, Law Rep. 1 C. P. 274; in error, Law Rep. 2 C. P. 311.

(3) 1 H. & N. 247; 25 L. J. (Ex.) 339.

(4) Law Rep. 2 C. P. 371, 374.

(5) 9 C. B. 392; 19 L. J. (C.P.) 195.

(6) Law Rep. 1 C. P. 274; in error, Law Rep. 2 C. P. 311.

(7) 10 M. & W. 109.

alleged that he was lawfully there. We cannot infer that there was anything in the nature of a public nuisance. Then, is there any contract or privity between the plaintiff and the defendant out of which a liability could arise? No contract is alleged, not even between the defendant and the proprietor of the house. There is nothing to shew how any liability or duty to the plaintiff could arise. Then, was there anything like fraud or misrepresentation or concealment, so as to bring the case within the principle of *Langridge* v. *Levy?* (1) I find nothing equivalent to that. There is no allegation that the defendant personally knew that the chandelier was improperly fixed. It is true, it is alleged that he hung it: but that allegation would be satisfied by proof that a servant or workman of the defendant hung it. I find nothing in the declaration to shew that any invitation was held out by the defendant to the plaintiff to place himself where he did. Nor is there any statement to shew that after it was hung the defendant had anything whatever to do with the chandelier. I think the case falls within the principle of *Winterbottom* v. *Wright.* (2)

WILLES, J. I am of the same opinion. The declaration is not founded upon any duty of the occupier of the house to protect persons lawfully coming there against any hidden danger of which the defendant knew or ought to have known; but it is founded on alleged carelessness in doing an act, viz. hanging a chandelier. The chandelier is to be regarded as moveable property; and the declaration should have shewn either that it was a thing dangerous in itself and likely to do damage, or that it was so hung as to be dangerous to persons frequenting the house. If that averment had been made and proved, the case might fall within the class to which *Sullivan* v. *Waters* (3) belongs,—as a trap to persons using or likely to use the way, whether public or not. That, however, is not this case. It is simply the case of a person who, being employed to hang a chandelier, hung it in a careless and negligent manner, it may be by a servant, under circumstances under which no knowledge could be imputed to the master. There would be no end of actions if we were to hold that a person having once

(1) 2 M. & W. 519; in error, 4 M. & W. 337.

(2) 10 M. & W. 109.

(3) 14 Ir. C. L. R. 460.

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done a piece of work carelessly, should, independently of honesty of purpose, be fixed with liability in this way by reason of bad materials or insufficient fastening. Take the case of a man building a house. His workpeople scamp the work: and five or six years afterwards a chimney-stack falls down through a high wind, and injures a person with whom he has no contract, to whom he owes no duty, and as against whom he cannot have been guilty of any fraud. To hold him liable to an action at the suit of the injured person would be going far beyond anything which has been decided in our law. Then take the case of a chattel, which may be well illustrated by the case of *Langridge* v. *Levy* (1), where the defendant, knowing that a gun was of dangerous construction, sold it to the father of the plaintiff for the use of himself and his sons, with a fraudulent warranty that it was a good and safe gun, and the plaintiff was injured by its bursting; and the action was held to be maintainable. The ground upon which the judgment of the Court of Exchequer in that case was affirmed by the Exchequer Chamber, is thus put by Lord Denman (2): "We affirm the judgment on the ground stated by Parke, B., 'that, as there is fraud, and damage, the result of that fraud, not from an act remote and consequential, but one contemplated by the defendant at the time as one of its results, the party guilty of the fraud is responsible to the party injured.'" By way of further illustration, I would also refer to *Seymour* v. *Maddox*. (3) This declaration fails to bring the case within that class of actions in which the defendant is charged with liability to strangers, and which I think ought not to be extended beyond cases where fraud is shewn.

BYLES, J. I am of the same opinion. This declaration, it is true, charges negligence, carelessness, and improper conduct. Negligence alone will not do, unless some breach of duty is shewn. It does not appear here what capacity the defendant fills. He may be a servant, or a master workman. He may be lessor of the premises, or lessee, or sub-tenant. All is left in doubt. Who and what is the plaintiff? All we know of him is that he is not a trespasser. He may have been a guest. That

(1) 2 M. & W. 519.
(2) 4 M. & W. 337, 338.
(3) 16 Q. B. 326; 20 L. J. (Q.B.) 327.

alone would not give him a cause of action. He may have gone into the house to get change for half-a-crown, or to make some inquiry. I cannot see any relation which he bears to the defendant, whence a duty could result which has been infringed.

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Judgment for the defendant.

Attorney for plaintiff: *Thomas Beard.*
Attorneys for defendant: *G. & W. Webb.*

THE BRITISH COLUMBIA AND VANCOUVER'S ISLAND SPAR, LUMBER, AND SAW-MILL COMPANY, LIMITED, *v.* NETTLESHIP.

June 2.

Measure of Damages—Carrier—Non-Delivery—Loss of Profits—Ship and Shipping—Delivery of Goods on board.

The plaintiffs delivered to the defendant's servants on a quay at Glasgow, for shipment on board the defendant's vessel which lay alongside, several cases containing machinery, which was intended for the erection of a saw-mill at Vancouver's Island. The master gave a bill of lading for them, describing the cases as containing "merchandize." The defendant knew generally of what the shipment consisted. On the arrival of the vessel at her destination, one of the cases, which contained machinery without which the mill could not be erected, could not be found on board; and the plaintiffs were obliged to send to England to replace the lost articles:—

Held, that the defendant was liable for the loss of the machinery, as delivery to the defendant's servants alongside the vessel was equivalent to a delivery on board.

Held, also, that the measure of damages for the breach of contract was, the cost of replacing the lost articles in Vancouver's Island, with interest at 5 per cent. upon the amount until judgment, by way of compensation for the delay.

FIRST count of the declaration upon a charterparty between the defendant, the owner of the ship *Kent*, and the plaintiffs, whereby it was agreed that the *Kent* should proceed to Liverpool, and there load a cargo, and should therewith proceed to Victoria and Vancouver's Island, and deliver the same on payment of freight. Averment that goods were loaded on board the ship by the plaintiffs for the voyage, and that all conditions were fulfilled and performed necessary to entitle the plaintiffs to have the same delivered at a certain port in Vancouver's Island. Breach, that a box of machinery, part

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of the goods shipped, was not delivered, whereby the plaintiffs sustained damage by losing the value of the box and its contents, and also by reason of the other goods which were delivered being by the loss of the box rendered wholly useless to the plaintiffs, by reason of the contents of the said box being part with the goods which were delivered of certain machinery.

The second count was upon a bill of lading, and was for the loss of the same box of machinery as in the first count mentioned, and damage was alleged as in the first count.

Pleas, traversing the making of the charterparty and bill of lading, the loading, and the breaches, and also the delivery and receipt of the goods respectively as alleged. Issue thereon.

The cause was tried before Bovill, C.J., at the sittings in London after last Hilary Term. It appeared that a large quantity of machinery for the construction of a sawing-mill, packed in cases, was sent from the works of the engineers who made it, to the quay at Glasgow, alongside which the *Kent* was lying; that several other vessels were also loading at the same spot; that a mate's receipt was given and a bill of lading afterwards signed by the captain for the whole number of cases; and that, on the arrival of the *Kent* at Vancouver's Island, although the hatches had never been opened during the voyage, one of the cases, which weighed about two tons and a half, and which contained a large quantity of the smaller and more important parts of the machinery, and without which the mill could not be erected, was not to be found.

His Lordship told the jury that, if the case was delivered alongside the vessel into the custody of the defendant's agents, the defendant was as much responsible for it as if it had actually been shipped; and he left it to them to say whether or not it was so delivered. The jury found that it was. A verdict was thereupon entered for the plaintiffs for 3000*l.*, the full sum claimed, subject to the opinion of the Court as to the principle upon which the damages were to be ascertained by an arbitrator; and the following order of nisi prius, embodying the grounds upon which the plaintiffs' claim was founded was drawn up by consent, for the guidance of the Court:—

1. The defendant was part-owner of the ship *Kent*. The master of that ship, who was also a part-owner of her, knew when he

agreed to carry the goods referred to in the charterparty and bill of lading sued upon, that the said goods, consisting of different parts of machinery, were intended for a mill to be erected and used in British Columbia for the purpose of the business of the plaintiffs in cutting and sawing timber.

2. The said master at the same time knew that the missing box contained part of the said machinery. The defendant had no personal knowledge as to the contents of the box or the nature of the cargo, save that it consisted of machinery.

3. The actual cost to the plaintiffs of replacing the missing machinery, including freight to British Columbia, was 353*l.* 17*s.* 9*d.*

4. The time occupied in replacing it was between eleven and twelve months, during which time the whole of the mill of which the missing portion formed part was stopped and useless. The defendant contended that the missing machinery could have been replaced much earlier.

5. The plaintiffs alleged that a fair rate of hire, or use and occupation value, at British Columbia, of the missing portion, taken by itself, from the time when it ought to have been delivered until the time it was replaced, would be 2646*l.* 2*s.* 3*d.* The defendant contended that there was no known rate of hire, or use and occupation value, at British Columbia, for the said missing portion.

6. The plaintiffs alleged that a fair rate of hire, or use and occupation value, at British Columbia, of the whole machinery of which the said missing portion formed part, to be applied to the purposes for which it was required by the plaintiffs for the said period, was 2646*l.* 2*s.* 3*d.* The defendant contended that there was no known rate of hire, or use and occupation value, at British Columbia, for the whole machinery.

7. The plaintiffs alleged that their actual loss greatly exceeded these amounts: but the defendant contended that the plaintiffs' alleged loss (if any) beyond the said sum of 353*l.* 17*s.* 9*d.* proceeded from other causes. The plaintiffs claimed the actual cost of replacing the said machinery, and also a rental or use and occupation value of the whole of the machinery, or of such part as the Court might think them entitled to, from the time the missing portion ought to have been delivered until it was replaced.

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8. The above figures were stated hypothetically; and it was agreed that it should be left to the arbitrator to ascertain the amounts in accordance with the opinion of the Court, and also to ascertain any other amounts or facts which according to the opinion of the Court might be decided to be material in determining the amount of damages.

Sir G. Honyman, Q.C., in Easter Term last, moved for a rule nisi to reduce the damages by the amount claimed beyond the cost of replacing the machinery which was lost, or as the Court might think fit; and also for a new trial, on the ground of misdirection. He submitted that the Lord Chief Justice ought to have told the jury that the responsibility of the defendant did not commence until the goods were actually put on board; citing *Grant* v. *Norway*. (1)

BYLES, J. My Lord left it to the jury in this case to say whether the goods in question were delivered into the charge of the servants of the defendant. I see no misdirection in that. *Gattorno* v. *Adams* (2) is rather an authority against the defendant. The necessity and convenience of commerce require that the owner's liability should commence from the moment the goods get into the hands of his servants. The rule will go therefore only for a reduction of damages.

BOVILL, C.J., KEATING, J., and MONTAGUE SMITH, J., concurred. (3)

Rule nisi.

C. Pollock, Q.C., and *Watkin Williams*, shewed cause. The plaintiffs claim to be entitled by way of damages for the defendant's breach of contract, beyond the cost of replacing the lost machinery, to compensation for the loss of profits which they sustained whilst their mill by reason of the loss remained idle. It is to be observed that the whole of the machinery was to be despatched by the defendant's ship, and that the defendant knew that the cases con-

(1) 10 C. B. 665.
(2) 12 C. B. (N.S.) 560.
(3) See *Meyer* v. *Dresser*, 16 C. B. (N.S.) 646; 33 L. J. (C.P.) 289.

tained machinery for a mill; and that distinguishes this case from *Hadley* v. *Baxendale.* (1) The plaintiffs are entitled to be put, as to all the ordinary consequences of a breach, in the same condition as if the contract had been performed, so far as a money compensation can do it: *Ogle* v. *Lord Vane.* (2) In Pothier, Traité des Obligations, Part 1, c. 2, s. 159, the general rule is thus stated: "Damages and interests are the loss which a person has sustained, or the gain which he has missed." He then puts, amongst others, the case of a letting of a house: "So, if I have let my house to a person in his quality as a tradesman, or for the purpose of being used as an inn, and the tenant is evicted, the damages and interests for which I am answerable to him will not be confined to the expense of removal and the advance of rents. The loss of custom, if he cannot meet with any other suitable house in the neighbourhood, ought also in some degree to be taken in the account; for, having let my house for the purpose of a shop or an inn, this kind of damage is one whereof the risk is foreseen, and to which I am considered as having tacitly submitted." *Cory* v. *Thames Ironworks Company* (3), though not an authority which governs this case, may be referred to as giving a limit. It having been sought there to limit the rule in *Hadley* v. *Baxendale* (1) to such consequences of a breach as the defendant had notice of, Cockburn, C.J., says (4): "I think the construction which Mr. Coleridge seeks to put upon the case of *Hadley* v. *Baxendale* (1) is not the correct construction as applicable to such a case as this. If that were the correct construction, it would be attended with the most mischievous consequences; because this would follow, that, whenever the seller was not made aware of the particular and special purpose to which the buyer intended to apply the thing bought, but thought it was for some other purpose, he would be relieved entirely from making any compensation to the buyer, in case the thing was not delivered in time, and so loss was sustained by the buyer." To limit the plaintiffs' damages to the cost of replacing the missing articles would be gross injustice.

(1) 9 Ex. 341; 23 L. J. (Ex.) 179. 18 Jur 358

(2) Law Rep. 2 Q. B. 275; in error, Law Rep. 3 Q. B. 272.

(3) Law Rep. 3 Q. B. 181.

(4) Law Rep. 3 Q. B. at p. 189.

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[BOVILL, C.J., referred to *Wood* v. *Bell* (1), *Fletcher* v. *Taylor* (2), and *Russell* v. *Bandeira*. (3)]

In *Sneed* v. *Foord* (4), which was an action for not delivering a threshing-machine within the time limited by the contract, the plaintiff was allowed to recover substantial damages in respect of the expense of stacking his wheat, of loss arising from its deterioration by rain, and of the expense of kiln-drying it,—these being expenses which must reasonably be supposed to have been contemplated by the parties as the result of a breach of the contract. The rule was also much considered in *Wilson* v. *Lancashire and Yorkshire Railway Company*. (5) Here, the proper measure of damages is, besides the cost of replacing the lost articles, the reasonable value of such a mill for the period during which the plaintiffs were deprived of the means of carrying on their business therein.

Sir G. Honyman, Q.C., and *Lanyon*, in support of the rule. The plaintiffs are entitled to 353*l.* 17*s.* 9*d.*, the cost of replacing the lost goods, but no more. This is an action for a breach of contract, not for a tort. In order to render the defendant liable for the consequences resulting to the plaintiffs from the breach of contract, the plaintiffs must shew that the defendant had notice that the case in question contained an important part of the machinery, in the absence of which no part of it could be used; they must also shew that he was aware that the case contained articles which could only be obtained in England. Nothing of the kind was communicated to the defendant. All he knew was that this was part of a large shipment, and that it was described in the bill of lading as a box of "merchandize." Mere knowledge, however, will not do: it must be something which impliedly makes it part of the contract. Pothier, Part 1, c. 2, s. 162, supports the view. "Sometimes," he says, "the debtor is liable for the damages and interests of the creditor, although extrinsic; which is the case when it appears that they were contemplated in the contract, and that the debtor submitted to them either expressly or tacitly, in case of the non-performance of his obligation."

(1) 5 E. & B. 772; 25 L. J. (Q.B.) 148; in error, 6 E. & B. 355; 25 L. J. (Q.B.) 321.

(2) 17 C. B. 21; 25 L. J. (C.P.) 65.

(3) 13 C. B. (N.S.) 149; 32 L. J. (C.P.) 68.

(4) 1 E. & E. 602; 28 L. J. (Q.B.) 178.

(5) 9 C. B. (N.S.) 632; 30 L. J. (C.P.) 232.

That carries out what is stated in the notes to *Vicars* v. *Wilcocks*. (1) In *Smeed* v. *Foord* (2), Crompton, J., says: "We must not, in my opinion, extend the doctrine of *Hadley* v. *Baxendale* (3), which was the case of a carrier entrusted as such by one party with goods to be delivered to another, to a case like the present, in which the contract was for the delivery by one of the contracting parties to the other of a specific article intended for a particular purpose known to both of them."

[WILLES, J. You must add to that the qualification of Cockburn, C.J., in *Cory* v. *Thames Ironworks Company*. (4) Bare knowledge will not do: it must be a knowledge which forms the basis of the contract.]

The whole foundation of the plaintiffs' argument fails in that respect. The rule was further considered in *Rice* v. *Baxendale* (5), and *O'Hanlan* v. *Great Western Railway Company*. (6) The utmost measure of damage here will be as in the last cited case, charging profits of trade for money lying idle. See also Sedgwick on Damages, p. 69, ed. 1858; and *Gee* v. *Lancashire and Yorkshire Railway Company*. (7)

BOVILL, C.J. In this case it is agreed that the verdict shall stand for the plaintiffs for 353*l*. 17*s*. 9*d*., the cost of replacing the articles lost, with the cost of carrying them to their destination. The difficulty arises in respect of the plaintiffs' claim for damages for the delay in replacing the contents of the lost box, nearly twelve months having been thus consumed by reason of the impossibility of completing the machinery in Vancouver's Island. Are the plaintiffs entitled to damages in respect of that delay? and if so, upon what principle are those damages to be assessed? It is to be observed that the defendant is a carrier, and not a manufacturer of goods supplied for a particular purpose. The extent of the carrier's liability is to be governed by the contract he has entered into, and the obligations which the law imposes upon him. He is not to be made liable for damages beyond what may fairly

(1) 2 Sm. L. C. 4th ed. p. 425, et seq.
(2) 1 E. & E. 602; 28 L. J. (Q.B.) 178.
(3) 9 Ex. 341; 23 L. J. (Ex.) 179.
(4) Law Rep. 3 Q. B. 181.
(5) 7 H. & N. 96; 30 L. J. (Ex.) 371.
(6) 34 L. J. (Q.B.) 154.
(7) 6 H. & N. 211; 30 L. J. (Ex.) 11.

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be presumed to have been contemplated by the parties at the time of entering into the contract. It must be something which could have been foreseen and reasonably expected, and to which he has assented expressly or impliedly by entering into the contract. The defendant admits that he is liable for the value of the articles which were lost. Beyond that, I think he is responsible for the delay, as a consequence of his breach of duty. In considering the question of delay, and the principle upon which the damages for it are to be assessed, many serious considerations arise. No stronger instance can be put than that of a failure of an engagement to pay acceptances at maturity. The non-payment may cause the destruction of the creditor's trade; and the debtor may know that inevitable ruin will be the result. And yet what in that case is the measure of damages which the creditor is entitled to recover? Has it ever been held to be the actual amount of the damage sustained? Certainly not. The true measure is, a reasonable compensation for the non-performance of the contract. In practice that is now settled on the principle of allowing interest, varying sometimes in amount. In the present case, a claim is made for the loss incurred by the stoppage of the works during the time that the whole machinery remained useless by reason of the absence of the missing box. But, was that stoppage a consequence that was known or could be contemplated? The defendant certainly knew that the box contained part of the machinery. But it was not shewn that he knew it contained a material part, and that without it none of the machinery could be put together. If he had no such knowledge, how can it be said that he intended to become responsible for the consequences which are now sought to be imposed upon him? Such damages must be purely speculative. All the defendant could know was that a mill was intended to be erected. He could not speculate upon the sort of business intended to be carried on, or as to whether the carrying it on would entail profit or loss. It is impossible that all these contingencies could have been contemplated by the parties at the time of entering into the contract, as the probable consequence of a breach of it. Suppose the whole of the machinery had been lost by a peril of the sea, through the negligence of the captain, or suppose it had been stolen, could the plaintiffs have claimed the value of the

articles and also damages for the loss of the use they might have made of them? Where has such a principle ever been laid down? The measure of damages may be very different in cases of fraud. But I know of no case nor any principle which can justify such a claim as this in an action for a breach of contract. My Brother Willes has handed me a case of collision decided by Dr. Lushington in the Admiralty Court, the case of *The Columbus*. (1) The claim there was for the loss of profits and master's earnings during the time the damaged vessel was under repair. In delivering judgment, the learned judge says: "I do not recollect a case, and no case has been suggested to me, where a vessel has been considered as a total loss, and, the full value of that vessel having been awarded by the registrar and merchants, any claim has been set up for compensation beyond the value of that vessel." And in another part of the judgment he says: "Supposing, for instance, that this vessel had been an East Indiaman, bound on her outward voyage to the East Indies with a valuable cargo on board, for the transportation of which not only would the owners be entitled to a large amount of freight, but the master might be entitled to considerable contingent profits from the allowances made to him upon such a voyage. Could this Court take upon itself to decide upon the amount of these contingencies, and to decree the payment of the same in addition to the payment of the full value of the ship? I am clearly of opinion that it could not. The true rule of law in such a case would, I conceive, be this, viz. to calculate the value of the property destroyed, at the time of the loss, and to pay it to the owners as a full indemnity to them for all that may have happened, without entering for a moment into any other consideration." If that be the true rule in the case of a wrongful act committed by a vessel, how much more forcibly it applies where the question depends on contract, where the consent of the defendant is to be implied. It is difficult to see any proper way of compensating the plaintiffs for the delay they have suffered, except by applying the rule which obtains in the case of non-payment of money, viz. by allowing interest on the value of the goods which had to be replaced. I think this will meet the justice of the case, and be consistent with law.

(1) 3 Wm. Rob. 158.

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8 C.P. 134

WILLES, J. I am of the same opinion. Cases of this kind have always been found to be very difficult to deal with, beginning with a case said to have been decided about two centuries and a half ago, where a man going to be married to an heiress, his horse having cast a shoe on the journey, employed a blacksmith to replace it, who did the work so unskilfully that the horse was lamed, and, the rider not arriving in time, the lady married another; and the blacksmith was held liable for the loss of the marriage. The question is a very serious one; and we should inevitably fall into a similar absurdity unless we applied the rules of common sense to restrict the extent of liability for the breach of a contract of this sort. The rule of the Civil Law, as stated by Pothier (1), was, in the absence of fraud, to award for the breach of a contract relating to a chattel double the value of the chattel itself. But he goes on to say that this is "an arbitrary or positive law, which, as such, has not any authority in the provinces of France. But the principle on which it is founded, of not allowing a debtor who is free from the imputation of any fraud to be charged with damages and interests resulting from the non-performance of his obligation, beyond the sum to which at the utmost they might be expected to amount, being founded upon reason and natural equity, we ought to follow this principle, and moderate the damages and interests, when they are excessive, agreeably thereto, leaving this moderation to the discretion of the judge." What, then, is the rule which ought to govern a case of this sort? I am disposed to take the narrow view, that one of two contracting parties ought not to be allowed to obtain an advantage which he has not paid for. The conclusion at which we are invited to arrive would fix upon the ship-owner, beyond the value of the thing lost, and the freight, the further liability to account to the intended mill-owners, in the event of a portion of the machinery not arriving at all or arriving too late through accident or his default, for the full profits they might have made by the use of the mill if the trade were successful and without a rival! If that had been presented to the mind of the ship-owner at the time of making the contract, as the basis upon which he was contracting, he would at once have rejected it. And, though he knew from the shippers the use they intended to

7 C.P. 588

(1) Traité des Obligations, Part i. c. 2, s. 164.

make of the articles, it could not be contended that the mere fact of knowledge, without more, would be a reason for imposing upon him a greater degree of liability than would otherwise have been cast upon him. To my mind, that leads to the inevitable conclusion that the mere fact of knowledge cannot increase the liability. The knowledge must be brought home to the party sought to be charged, under such circumstances that he must know that the person he contracts with reasonably believes that he accepts the contract with the special condition attached to it. The case of *Ogle* v. *Lord Vane* (1) is not much to the purpose: the arrangement as to damages took place after breach. Several circumstances occur to one's mind in this case to shew that there was no such knowledge on the defendant's part which would warrant the conclusion contended for by the plaintiffs. In the first place, the carrier did not know that the whole of the machinery would be useles if any portion of it failed to arrive, or what that particular part was. And that suggests another consideration. He did not know that the part which was lost could not be replaced without sending to England. And, applying what I have before suggested, if he did know this, he did not know it under such circumstances as could reasonably lead to the conclusion that it was contemplated at the time of the contract that he should be liable for all those consequences in the event of a breach. Knowledge on the part of the carrier is only important if it forms part of the contract. It may be that the knowledge is acquired casually from a stranger, the person to whom the goods belong not knowing or caring whether he had such knowledge or not. Knowledge, in effect, can only be evidence of fraud, or of an understanding by both parties that the contract is based upon the circumstances which are communicated. That is indicated by Pothier in the passage referred to, and distinctly pointed out in the case of the canon. And that, no doubt, is what was intended by the Lord Chief Justice in *Cory* v. *Thames Ironworks Company*. (2) In conclusion, referring to the rule for the assessment of damages laid down in the case of collisions, see the vast field of inquiry which would be opened out, involving speculations of the wildest kind, if we are to

(1) Law Rep. 3 Q. B. 272.

(2) Law Rep. 3 Q. B. 181.

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4 C.P.D. 286

take into consideration the plaintiffs' intention to erect a mill, and to set up for the first time a trade the probable profits of which are wholly incapable of calculation or approximation. It would be making a guess, in order to impose upon the carrier for the mere breach of a contract an extent of liability which we should decline to fix even upon a wrong-doer. Take the case of a barrister on his way to practise at the Calcutta bar, where he may have a large number of briefs awaiting him: through the default of the Peninsular & Oriental Company he is detained in Egypt or in the Suez boat, and consequently sustains great loss; is the company to be responsible for that, because they happened to know the purpose for which the traveller was going? I entirely agree with my Lord that the plaintiffs cannot recover damages beyond the sum necessarily expended in replacing the lost box of machinery, and the freight, and interest upon the amount for the time the plaintiffs were delayed.

BYLES, J. The subject having been exhausted by my Lord and my Brother Willes, I have nothing to add. The verdict will stand for 353*l.* 17*s.* 9*d.*, and interest at 5 per cent. until judgment, the costs of this application to be allowed to the plaintiffs as part of their costs in the cause.

Rule discharged.

Attorneys for plaintiffs: *Freshfields & Newman.*
Attorneys for defendant: *Thomas & Hollams.*

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June 4.

Vendor and Purchaser—Agreement for Sale of a Public-house—Transfer of Licences under 9 *Geo.* 4, *c.* 61—*Parliament Roll.*

On the 17th of January, 1867, upon a contract for the sale of a public-house, the vendor agreed to make a proper assignment of the licences on the 5th of February, 1867, the day fixed for the completion of the contract, or as soon thereafter as might be. The business of the house had been carried on under the management, and under a licence granted under 9 Geo. 4, c. 61, in the name, of the vendor's son A., as servant to his father. In November, 1866, A. went to America, and had not since been heard of, and since that time, but without any transfer of the licence from A., the business had been continued under the management of B., another son of the vendor:—

Held, that the vendor, not being able to obtain the indorsement of the licence by A., was not in a condition to perform his contract, and consequently that the purchaser might recover back his deposit and the expenses which he had incurred in and about the purchase.

The marginal note to a section of a statute in the copy printed by the Queen's Printer, forms no part of the statute itself, and is not binding as an explanation or construction of the sections.

THESE were cross-actions upon an agreement for the sale of the lease and goodwill of a public-house.

The first action was by the purchaser, for a refusal by the vendor to complete the contract. The second action was by the vendor, for a refusal by the purchaser to complete.

The two causes came on for trial before Bovill, C.J., at the Kingston spring assizes, 1867, when a verdict was taken in each for the plaintiff, subject to the opinion of the Court upon the following case:—

1. N. Claydon, the plaintiff in the first action and defendant in the second (hereinafter called "the purchaser"), has for some years carried on the business of a publican. R. Green, the defendant in the first and plaintiff in the second action (hereinafter called "the vendor"), has also been in business for some years as a publican, and in January, 1867, was possessed of a dwelling-house and premises in Great New Street, Fetter Lane, London, for the unexpired residue of a term of forty years from Christmas, 1866. These premises were at that time used and occupied as a public-house, known by the name of The Gentleman and Porter.

2. On the 17th of January, 1867, an agreement was entered

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into between the vendor and the purchaser, by which Richard Green, the vendor, in consideration of 50*l.* deposit, and of the further sum of 2050*l.* to be paid to the vendor at the time hereinafter mentioned, agreed with N. Claydon, the purchaser, to furnish a proper title, subject as therein mentioned, and well and effectually to assign to him the lease of his now dwelling-house and premises, The Gentleman and Porter, New Square, Fetter Lane, and all his right, title, and interest therein, and the goodwill thereof, for the remainder of a term then to come and unexpired, and to deliver up possession of the house and premises to the purchaser on or before the 5th of February next, and to clear up all rents, taxes, gas-light rent, and all incumbrances and outgoings whatsoever up to the day of taking possession: "Also to make a good and proper assignment of the victualler's and other licences at the time above mentioned, or as soon thereafter as may be, on being paid for the time unexpired therein, and for that purpose to attend on the usual days appointed for the transfer of licences, and do all acts necessary for vesting the same in the said purchaser, his executors," &c.: And the purchaser agreed to accept such assignment of the lease, and to take possession of the premises on the 5th of February then next, and to pay the 2050*l.*, being the remainder of the purchase-money for the lease and goodwill: Also, to purchase at a fair appraisement part of the household furniture, fixtures, and other effects as then were on the premises, and likewise at fair gauge and valuation all the stock in trade as therein mentioned, and to pay for the same at the time of taking possession: And it was further agreed that, if either party should refuse or neglect to perform his part of the agreement, he should pay to the other 200*l.*, thereby mutually agreed to be the damages ascertained and fixed on breach of any part of the agreement, the same to become a just debt, and recoverable in any of Her Majesty's courts of law; and proof of the signing of this agreement shall be sufficient evidence of the same: And, in case of default by the said purchaser, the deposit-money to be forfeited in part of such damages.

The purchaser duly paid the deposit of 50*l.*

3. There is a well-known practice for the vendor, upon the transfer of a public-house, at the time of completion, when the lease is assigned and the purchase-money paid, to indorse the

magistrates' and excise licences under and by virtue of which the business of a publican has been carried on upon the premises. It sometimes, though not frequently, happens that the licences are in the name of some person other than the vendor. In such cases, they are handed over by the vendor to the purchaser without indorsement. Upon completion of the transfer, application is made to justices, or, in the metropolitan district, to a police-magistrate, for their or his indorsement upon the magistrates' licence, pursuant to the 5 & 6 Vict. c. 44, s. 1, to enable the purchaser to carry on business till the next special session. The indorsement of the licence by the person previously licensed will not alone entitle the purchaser to the magistrates' indorsement, nor, on the other hand, is it indispensable. It testifies the consent of the previous licensee; but the magistrate does not ordinarily require specific evidence of such consent, if satisfied with the statement of the vendor. The magistrate, on being satisfied that there has been a bonâ fide transfer of the public-house, and of the goodwill thereof, by the person really entitled to dispose of it, and that the purchaser is in possession, and is a fit and proper person, ordinarily indorses the licence. There is no known practice in cases where the previous licensee is abroad at the time when the application is made to the magistrate. At the next special session holden under the 9 Geo. 4, c. 61, application is made to the magistrate by the purchaser for a licence, under s. 14 of that act, to enable him to carry on business till the next general annual licensing meeting holden under the same act.

4. On the 7th of February last, the necessary appraisement was made, pursuant to the agreement, and the amount thereof was found to be 2359*l.*, including the price of the lease, goodwill, stock in trade, fixtures, &c., and also a sum of 11*l.* 7*s.* for the estimated value of the time unexpired of the licences. The parties met on the same day for the purpose of completing the purchase. The vendor was prepared to give immediate possession of the premises, and the purchaser was prepared to pay the purchase-money. It was then for the first time disclosed to the purchaser (who had up to that time believed that the licences had been granted to and were in the name of the vendor) that the licences had been granted to and were in the name of Richard Green, the younger, who was

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a son of the vendor. Although the licences had been granted to and taken out in the name of Richard Green the younger, and he had conducted the business up to the time hereinafter mentioned, he had been but a servant to his father, the vendor, to whom in fact the house, effects, and business had belonged, and from whom he had received wages for conducting the business.

5. In November, 1866, Richard Green the younger had left this country, and had gone, so far as was known by his family, to America. On the going away of Richard Green the younger, the vendor had put another of his sons, John Green, into the house, to conduct the business as his servant, receiving wages; and from thenceforward John Green had conducted the business up to the said 7th of February, the licences still remaining in the name of Richard Green the younger. The purchaser declined to complete the purchase or pay the purchase-money without the indorsement of the licences by Richard Green the younger. The vendor was unable to procure such indorsements. A discussion ensued, in which the purchaser required the whole of the purchase-money to be deposited in the hands of a third person; and the vendor offered to allow 100*l.* of it to be so deposited, which was declined by the purchaser as insufficient to cover the amount of his loss, in case the magistrates' indorsement on the transfer could not be obtained; and the attempt at an arrangement came to nothing. The purchase and sale remained uncompleted, and no further negotiations took place between the parties.

6. John Green continued after the said 7th of February to conduct the business for his father; and, on the 23rd of February, 1867, at the next special sessions, he applied to the magistrates, and upon stating, as was the fact, that he was in possession of the public-house, the licence was, as it is called in the trade "transferred" to him, that is to say, a new licence was granted by the magistrates to him for the time then to run and unexpired in the then-existing licence.

7. The purchaser has not received back his deposit of 50*l.*, which still remains in the hands of the vendor. The purchaser has paid, or incurred a liability to pay, the following sums, viz. a moiety of the solicitors' charges for stamps, investigation of title, and preparation of assignment, 21*l.* 14*s.* 9*d.*; gauger's fee, 7*l.* 7*s.*; broker's

charges, 16*l.* 16*s.*; broad cooper, 2*l.* 2*s.*; printer, for business circulars announcing that the purchaser had taken the public-house, 1*l.* 2*s.* 6*d.*; removing furniture, 1*l.* 4*s.*; barman and cellarman engaged to serve at the public-house, in lieu of notice, 2*l.* 8*s.*

8. The vendor paid, or incurred a liability to pay, the following sums, viz. a moiety of the solicitors' charges, as mentioned in par. 7, 21*l.* 14*s.* 9*d.*; broker's charges, 12*l.* 12*s.*; and broad cooper, 1*l.* 1*s.* Since the commencement of these actions, the vendor has sold the lease and goodwill of the public-house for 1900*l.*

9. It was agreed that the pleadings in each action should form part of the case, and that the Court should be at liberty to amend in any way that might be necessary for the purpose of determining the real matter in controversy between the parties; and also that the Court might draw any inference or find any facts which a jury ought to have drawn.

The questions for the Court were, whether the purchaser was entitled to recover from the vendor the 50*l.* paid by him by way of deposit, and whether he was entitled to recover from the vendor, either the 200*l.* as liquidated damages, or any sum, under the circumstances; and whether the vendor was entitled to recover from the purchaser the 200*l.* as liquidated damages, or any sum. The verdict was to be entered for the plaintiff or the defendant in each action as the Court should direct; and, if for the plaintiff, for such sum as the Court should direct.

Denman, Q.C. (*Cave* with him), for the purchaser. Green, the vendor, was not in a condition to perform his contract on the 5th of February, 1867, the day fixed for the completion, or at any other time; for, he had no licence which he could transfer or assign to the purchaser. *Day* v. *Luhke* (1) is precisely in point. It was there held, that, upon the sale of a public-house as a going concern, time is of the essence of the contract: and, in the absence of an express stipulation to the contrary, the purchaser is entitled to have a transfer of the licence under s. 11 of the Licensing Act, 9 Geo. 4, c. 61. Section 4 of that act impowers the justices assembled at the general annual licensing meeting in every year, to appoint special sessions, "at which special session it shall be

(1) Law Rep. 5 Eq. 336.

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lawful for the justices then and there assembled, in the cases and in the manner and for the time thereinafter directed, to license such persons intending to keep inns theretofore kept by other persons being about to remove from such inns, as they the said justices shall, in the exercise of the powers herein contained and in the exercise of their discretion, deem fit and proper persons, under the provisions hereinafter enacted, to be licensed," &c. And s. 11 provides that "every person holding a licence under the authority of this act, or his heirs, &c., being desirous to transfer such licence to some other person, and intending to apply at the special session then next ensuing for permission so to do, shall, five days at the least prior to such special session, serve a notice of such his intention upon one of the overseers," &c., in the form in Sched. B., signed by the party intending to make such application, or by his agent thereunto authorized, and setting forth the Christian and surname of the person to whom it is intended that such licence shall be transferred, together with the place of his residence, and his trade or calling, during the six months previous to the time of serving such notice. Here, the vendor was not "a person holding a licence under the authority of the act." His son Richard had a licence which had expired and had never been transferred to the vendor. Sect. 14 (1) does not help: that enactment is confined to the specific cases therein enumerated, and does not embrace a case

(1) "Which enacts that, if any person duly licensed under this act shall (before the expiration of such licence) die, or shall be by sickness or other infirmity rendered incapable of keeping an inn, or shall become bankrupt or insolvent; or if any person so licensed, or the heirs, &c., of any person so licensed, shall remove from or yield up the possession of the house specified in such licence; or if the occupier of any such house, being about to quit the same, shall have wilfully omitted or shall have neglected to apply at the general annual licensing meeting, or at any adjournment thereof, for a licence to continue to sell excisable liquors, &c.; or if any house, being kept as an inn by any person duly licensed as aforesaid, shall be or be about to be pulled down or occupied under the provisions of any act for the improvement of the highways, or for any other public purpose, or shall be by fire, tempest, or other unforeseen and unavoidable calamity, rendered unfit for the reception of travellers, and for the other legal purposes of an inn, it shall be lawful for the justices at special session, in any one of the above-mentioned cases, and in such cases only, to grant to the heirs, &c., of the person so dying, or to the assigns of such person becoming incapable of keeping an inn, or bankrupt, &c., or to any new tenant or occupier of any house so become unoccupied, &c., a licence," &c., &c.

like this. The Master of the Rolls, in *Day* v. *Luhke* (1), after holding that time is of the essence of such a contract, says: "The question then resolves itself into this: were the plaintiffs on the 21st of November, 1866, in a position to complete the transfer of the business? This depends in some degree on the construction to be put on the act which regulates the granting of licences to keepers of inns, alehouses, and the like in England, 9 Geo. 4, c. 61. The question is whether the transfer of the licence to the purchaser, the defendant in this case, could be effected under the 11th or the 14th sections." His Lordship read s. 11, and shewed why it was inapplicable to the case before him. He then proceeds: "The vendors have recourse to s. 14, to obviate this difficulty." [His Lordship read s. 14.] "The defendant objects to proceeding under this section on account of the delay, and also the risk of carrying on business without a licence. In answer to this the plaintiffs contend that the risk is very small, and that in fact some cessation of the business of a public-house must take place in any sale; for that, if the holder of the licence attends at 'the change,' and signs the notices, and indorses the licence, still, until the five days have expired, the purchaser would not legally be entitled to carry on the business, which in fact he always does. I think that this difficulty is met by the statute 5 & 6 Vict. c. 44, which seems to me to have been enacted to obviate this objection: but, assuming it to be true that such is the case, there is a great difference between the two cases. Practically no difficulty arises in this respect under the 11th section; the transfer of the licence by the magistrates at the expiration of the five days is a matter of course, and no discretion at all is exercised by them in the matter, unless they should have information that the transferee was an objectionable person; and no person ever attempted to enforce a penalty for carrying on the business during the five days of abeyance. But it is a very different matter under the 14th section, when the magistrate in fact performs a judicial duty, as is shewn by the evidence and by the facts of the case." As to the damages, the case falls precisely within the principle of *Engel* v. *Fitch*. (2) The damages the plaintiff is entitled to, therefore, will be the amounts mentioned in the 7th paragraph of the special case.

(1) Law Rep. 5 Eq. at p. 343. (2) Law Rep. 3 Q. B. 314.

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Barnard, contrà. The vendor was ready and willing to transfer to the purchaser a licence under s. 14. And there was no hardship on the purchaser to make him take a transfer under that section instead of under s. 11. There is no provision for what the justices are to do under that section. All the proceedings are under s. 14. The judgment of the Master of the Rolls in *Day* v. *Luhke* (1) proceeds upon a mistake. If the application is under s. 11, five days' notice is required: under s. 14, no notice at all is needed. The only object of the 5 & 6 Vict. c. 44, s. 1, was, that there should not be a long interval between the contract for the purchase and the transfer of the licence.

[BOVILL, C.J. You assume that this was a licensed house. The person to whom the licence had been granted, viz. Richard Green the younger, had gone away; and there was no person who could transfer the licence.]

The case is exactly met by s. 14. The Master of the Rolls assumes that the duty of the magistrates under s. 11 is ministerial only, but under s. 14 judicial. In both cases, however, he exercises the same jurisdiction, and must exercise a discretion under all the circumstances brought before him.

Denman, Q.C., in reply.

BOVILL, C.J. In this case there was a special agreement for the sale of a public-house, dated the 17th of January, 1867, by the terms of which the contract was to be completed on the 5th of February. The agreement contained an express provision as to the transfer of the licences from the vendor to the purchaser. Even without such an express agreement, the Master of the Rolls, in the case of *Day* v. *Luhke* (1), thought it ought to be implied. In that respect, therefore, the present case is stronger than that; for, the vendor engages "to make a good and proper assignment of the victualler's and other licences at the time above-mentioned (viz. the 5th of February, 1868), or as soon thereafter as may be, on being paid for the time unexpired therein, and for that purpose to attend on the usual days appointed for the transfer of licences, and do all acts necessary for vesting the same in the purchaser, his executors, &c." The Licensing Act, 9 Geo. 4, c. 61, contains

(1) Law Rep. 5 Eq. 336.

various provisions for the transfer of licences. Section 4 refers to the case of persons about to remove. The marginal note to the section is, "Special sessions for transferring licences." At the time when that act passed, the parliament-roll had no marginal notes, or punctuation, nor were the statutes separated into sections. We cannot, therefore, look at the marginal note for an exposition of the meaning of the section. Indeed, it is difficult to see how the marginal notes could ever be used in the construction of acts of parliament, seeing that they are not put there by the legislature or assented to by them. The 4th section is, however, the only part of the act which refers to the transfer of the licences where one who has kept the public-house is about to remove from it and another person to come into possession; and, whether that is called the transfer of an existing licence or the grant of a new licence, that seems to me to be the only section which provides for the case. Section 11 requires a notice to be given where there is an intention to apply for the transfer of a licence. That, as I understand it, refers to the transfer or grant of a new licence mentioned in s. 4. Sched. B. provides the form of notice to be given on that occasion of the intention of the party to apply for a transfer. The statutory provisions, therefore, as to the assignment or transfer of licences, seem to me to be comprised in ss. 4 and 11, and Sched. B. The transfer under those sections would be effected either by an indorsement by the justices, or the grant of a new licence in the terms of the notice.

There is another clause, s. 14, which refers, not to transfers of licences in the sense in which that term is to be understood for the purposes of this case. That applies to various contingencies; for example, to the case of the death, infirmity, bankruptcy, or insolvency of the person licensed, or of his omission to apply for the renewal of his licence, or of the destruction of the premises by fire, tempest, or other unforeseen calamity; and it enacts that in such cases, and in such cases only, it shall be lawful for the justices in special sessions to grant to such persons a licence to sell exciseable articles. In such cases, with the exception of what is mentioned in the latter part of the clause, it does not appear that any notice is required. The magistrates would, of course, exercise their discretion as to granting or withholding the

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licence, according to the circumstances brought to their knowledge at the time of the application. It is clear, therefore, that the application for the transfer of a licence under ss. 4 and 11, is something very different from the application for a new licence under s. 14. The magistrates would consider the application and deal with it upon very different grounds. That seems to have been the view taken by the Master of the Rolls in *Day* v. *Luhke*. (1)

We have no evidence here that the contract contemplated any other assignment or transfer than that dealt with by ss. 4 and 11. If that be so, it is conceded that the vendor was not in a position to make such assignment or transfer. He had not a licence. His son, who had it, had gone to America in November, 1866. The vendor had not obtained any fresh licence. He made no application under s. 14, and took no steps whatever to obtain a transfer of the licence from his son. The case, therefore, entirely fails as to the ability of the vendor to make or to obtain any available assignment or transfer of the licences. He never was in a condition, therefore, to perform his contract in that respect, a most essential particular. Our judgment must consequently be for the purchaser. In *Day* v. *Luhke* (1) it seems to me that the construction put by the Master of the Rolls upon the contract and act of parliament, was quite right. I quite concur in the view he took of both.

If, then, the purchaser is entitled to recover in the first action, and to succeed also in the cross-action, the only question which remains is, what is the proper measure of damages. Mr. Denman claims the several sums mentioned in par. 7 of the special case. The counsel for the vendor has not addressed any argument to us upon the subject. I assume, therefore, he assents to the claim; otherwise there might probably be some ground to complain of our judgment for the plaintiff for those several sums.

WILLES, J. I am of the same opinion. The contract implies that the vendor of the public-house had a licence under which he was lawfully carrying on the business, and which he had power to transfer to the purchaser. When, however, the time arrived for

(1) Law Rep. 5 Eq. 336.

the performance of his engagement, it turned out that he had no licence at all; that a licence had formerly been granted in the name of his son; that the son had ceased to carry on the business and had gone abroad, and had given no authority for the transfer of the licence; and that the business was being carried on without any licence, in the name of another son of the vendor. It is enough, therefore, to say that the vendor had not a licence which he could transfer. Upon the true construction of the statute 9 Geo. 4, c. 61, a licence must mean a licence for carrying on the business by or for the licensee. That being so, it follows that the vendor could not perform what he had undertaken to perform. When the judgment of the Master of the Rolls in *Day* v. *Luhke* (1) comes to be considered, it will be found that this is a much stronger case than that for the application of the rule there adopted, because in that case the former tenant had gone away, and there was no person carrying on the business under the licence or on his behalf; and the Master of the Rolls points out the distinction between the application under s. 11, and that under s. 14, viz. that, in the latter case, it is necessary to go into an inquiry, amongst other things, whether the person who held the original licence, and who is no party to the application for a new one, is a person whom it would be practicable or proper to call upon for his consent. If any such inquiry had been made in this case, it might have been considered by the magistrate that the carrying on of the business by the second son after the elder son had gone away, and without any transfer of the licence, and not for the benefit of the licensee but of the father, presented such a state of circumstances as to raise an objection to the application being successful. It happened that when the matter did come before the magistrate, these facts did not transpire; and a new licence was obtained for the second son. That, however, shews that a new licence was necessary; and that, at the time this contract ought to have been performed, the business was being carried on without any licence at all.

Something has been said about the marginal note to s. 4 of the 9 Geo. 4, c. 61. I wish to say a word upon that subject. It appears from Blackstone's Commentaries, vol. i. p. 183, that,

(1) Law Rep. 5 Eq. 336.

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formerly, at one stage of the bill in parliament, it was ordered to be ingrossed upon one or more rolls of parchment. That practice seems to have continued down to the session of 1849, when it was discontinued, without however any statute being passed to warrant it: see May's Parliamentary Practice, 3rd ed. 382. Since that time, the only record of the proceedings of parliament,—the important proceedings of the highest tribunal of the kingdom,—is to be found in the copy printed by the Queen's printer. (1) But I desire to record my conviction that this change in the mode of recording them cannot affect the rule which treated the title of the act, the marginal notes, and the punctuation, not as forming part of the act, but merely as temporanea expositio. The act, when passed, must be looked at just as if it were still entered upon a roll, which it may be again if parliament should be pleased so to order; in which case it would be without these appendages, which, though useful as a guide to a hasty inquirer, ought not to be relied upon in construing an act of parliament.

BYLES, J. I agree with my Lord and my Brother Willes, that our judgment in this case must be for the purchaser. I think it is quite plain, on looking at ss. 4 and 11 of the act, and at Sched. B., a licence can only be granted to the person keeping or intending to keep the public-house; otherwise the magistrates would have no means of knowing how many houses might be kept by the same person, which for obvious reasons would be inconvenient. Now, the time fixed for the completion of the contract in this case was the 5th of February, or as soon thereafter as might be. What was the situation of the vendor on the 5th of February? Not only had he no licence which he could assign, but the licence had been granted to his son, who had gone abroad. Therefore at this time the business was being carried on without a licence,—the existing licence (if any) not having been granted to a person keeping or intending to keep the public-house. The vendor consequently was in the position of a man who had contracted to do a thing which he had no power to do. Assuming that the words of the contract gave him a reasonable time to put himself in a position to perform his part of it, what was his condition a week after-

(1) A copy of the foolscap folio edition printed on vellum.

wards, viz. on the 12th of February? It was the same: he had no licence. It is true that on the 23rd of that month, the vendor procured a new licence in the name of his other son, John Green. The same vice, however, which affected the licence to Richard Green the younger affected the licence to John Green. He was not the person who kept or intended to keep the public-house. The result is, that, at the time fixed for the performance of the contract, the vendor was, and still is, without a licence. The judgment, therefore, in both actions will be for the purchaser.

Judgment in the first action for the plaintiff.
Judgment in the second action for the defendant.

Attorney for the purchaser: *G. H. K. Fisher.*
Attorney for the vendor: *Henry Child.*

ASHBY, APPELLANT; HARRIS, RESPONDENT.

June 4.

Burial Act, 15 & 16 *Vict. c.* 85, *Construction of—Grant of exclusive Right of Burial—Keeping Grave in Repair.*

The burial board of St. Pancras granted to R. "the right and privilege of constructing a private grave" in their cemetery, and "the exclusive right of burial and interment therein," "to hold to her in perpetuity, for the purpose of burial and of erecting or placing therein a monument or stone;" with a proviso that, if such monument or stone with the appurtenances should not be kept in repair, according to such regulations as should be made by the board for the management of the cemetery, the grant should be void.

R. constructed a grave, and placed a head-stone and a kerb round it, and planted the space with shrubs and flowers:—

Held, that it was not competent to the board by a regulation subsequently made by them for the management of the cemetery to deprive R. of the right of planting and ornamenting the grave.

APPEAL from a decision of justices under 20 & 21 Vict. c. 43.

The appellant appeared before the justices in petty sessions at Highgate to answer a complaint of assault made by the respondent, when the following facts were proved or admitted:—

The burial board of St. Pancras has provided a burial ground at Finchley, under the provisions of the Burial Act, 15 & 16 Vict. c. 85. The appellant was an officer duly appointed by the board. The respondent is the wife of a gardener's assistant, at Finchley.

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On the 17th of August, 1857, the burial board made a grant to one Ann Robotham, of which the following is a copy:—

"Interment of Joseph Robotham.

"The burial board of the parish of St. Pancras, in the county of Middlesex. Established under the act 15 & 16 Vict. c. 85. No. 128.

"By virtue of an act passed in the 16 & 17 Vict., intituled, &c. (c. 134), we, the burial board of the parish of St. Pancras aforesaid, being an incorporation incorporated by and under the said act, in consideration of the sum of 2*l.* 2*s.* to us in hand paid by Mrs. Ann Robotham, of &c., do hereby grant and convey unto the said Ann Robotham the right and privilege of making and constructing a private grave, and the exclusive rights of burial and interment therein when made, in all that piece of land 6 ft. 6 in. long by 2 ft. 6 in. wide, situate and being in the second-class chapel ground of the St. Pancras cemetery, situate in the parish of Finchley, in the county of Middlesex, distinguished by the No. 10 in 12 K., to hold the same to the said Ann Robotham in perpetuity, for the purpose of burial and of erecting or placing therein a monument or stone. But, if the same shall not be so erected or placed within twelve calendar months from the date hereof (unless with licence for further time obtained from the said burial board), or if such monument or stone with the appurtenances to be so erected or placed shall not from time to time be kept in repair by the owner or owners for the time being, according to such rules, orders, and regulations as have been or shall from time to time hereafter be made by the said burial board for the management and regulation of the said cemetery and the vaults, graves, and monuments therein, this grant shall be void.

"Given under the common seal of the said burial board, &c.

"Charles Green, clerk to the board."

In accordance with this grant, Mrs. Robotham caused her husband to be buried in the said ground, and erected a head-stone and a kerb round the sides of the grave, leaving an open space at the top over the body without any stone or other covering.

John Harris, the respondent's husband, personally or by his agents, had been in the habit of planting the above-named open

space with flowers, from the year 1857 to October, 1867, by the authority and at the charges of Mrs. Robotham.

At the quarterly meeting of the burial board held in September, 1867, it was resolved that the board should undertake the planting of graves themselves, and that the superintendent should have authority to prevent other persons entering the cemetery for the purpose of interfering with such planting; and at a board holden on the 17th of September, 1867, it was resolved that the clerk issue notices to the owners of private graves planted with flowers, &c., informing them of the intention of the board to undertake such planting themselves for the future.

On the 1st of October, 1867, the clerk of the board sent a notice to Mrs. Robotham that the board had determined to undertake for the future all such planting and keeping up through their officers, and that from the date of the letter no other persons than those appointed by the board would be permitted to enter the cemetery for such a purpose; and with such notice a list of prices fixed by the board to be charged for planting and keeping up graves, was sent.

In January, 1868, John Harris received from Mrs. Robotham an authority to plant the grave; and on the 25th of that month, the respondent, as her husband's agent and assistant, went with her son to the burial ground to the grave, for the purpose of planting the same, and was informed of the order of the burial board, and required to desist from planting the grave or otherwise interfering with it. The respondent persisted in commencing to dig the open space between the kerb-stones and over the body, for the purpose of sowing flower-seeds, and was forcibly prevented from continuing so to do by the appellant, who acted under the instructions given to him by the burial board; and for this assault she summoned him before the justices.

It was not contended that the respondent was digging the grave in an improper manner, or that she was about to sow or plant objectionable seeds, or that the appellant used greater force than was necessary to remove her from the grave to prevent her planting the same; and both parties waived any objection which might (by s. 46 of the 24 & 25 Vict. c. 160, as to offences against the person) have been made to the justices hearing and deciding the case, on the assertion of a right by either side.

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The respondent contended that she was justified under the authority of Mrs. Robotham, by virtue of the grant made to her by the burial board. And the appellant contended that such keeping in repair, if the open space over the grave should be deemed an appurtenance, or the planting of the open space, whether an appurtenance or not, was subject to such rules, orders, and regulations as should have been or might from time to time be made by the board; and that, in accordance with such rules, &c., he had authority to prevent her so planting the said grave. (1)

The justices, being of opinion that the respondent had a right to enter the burial ground and plant the grave under the authority of Mrs. Robotham as the grantee of the grave, for the purpose of keeping the monument and its appurtenances in repair, and that the order of the board that such planting should be done by no other person than those appointed by the board, at a rate of charges fixed by themselves, was unreasonable and beyond the powers conferred on them by s. 38 of 15 & 16 Vict. c. 85, convicted the appellant of the assault charged against him, in the penalty of 1*s.* and 17*s.* costs.

If the Court should be of opinion that the burial board was duly authorized to make a rule, order, or regulation that no person other than those appointed by the said board should be permitted

(1) The following clauses of the 15 & 16 Vict. c. 85, were referred to at the hearing:—

Section 32. "The parishioners and inhabitants of such parish or of each of such parishes shall have the same rights of sepulture in such burial ground as they respectively would have had in the burial ground or burial grounds in and for their respective parishes, subject nevertheless to the provisions herein contained."

Section 33. "Any burial board, under such restrictions and conditions as they think proper, may sell the exclusive right of burial either in perpetuity or for a limited period, in any part of any burial ground provided by such board, and also the right of constructing any vault or place of burial, with the exclusive right of burial therein in perpetuity or for a limited period, and also the right of erecting and placing any monument, gravestone, tablet, or monumental inscription in such burial ground."

Section 38. "The general management, regulation, and control of the burial grounds provided under this act shall, subject to the provisions of this act and the regulations to be made thereunder, be vested in and exercised by the respective burial boards providing the same: provided that any question which shall arise touching the fitness of any monumental inscription placed in any part of the consecrated portion of such grounds shall be determined by the bishop of the diocese."

to enter the cemetery for the purpose of planting the graves, the conviction was to be quashed; otherwise, to stand.

Powell, Q.C., for the appellant. The burial board had authority to make regulations as to planting and keeping the cemetery in order. This is expressly conferred upon them by s. 38 of the 15 & 16 Vict. c. 85. By the grant of August, 1857, no interest in any land is conveyed to Mrs. Robotham, but a mere permission to use it for the purpose of burial and of erecting therein a gravestone. If that involved a right to plant the grave, it was only subject to such regulations as the board might at any time thereafter think fit to make. Section 33 recognizes restrictions and conditions being imposed upon the rights of the inhabitants under s. 32.

[BOVILL, C.J. If the grantee may be prohibited from planting her husband's grave, she might equally be prohibited from visiting it.]

The regulation in question was one which did not affect Mrs. Robotham in particular, but affected the whole cemetery, and was rendered necessary by the neglected and slovenly condition in which the ground had been before kept.

Grantham, for the respondent. It was not competent to the burial board by any after-regulations to derogate from their grant. Whatever regulations the board may see fit to make for the future, the rights of this grantee depend upon the terms of the instrument under which she acquired the grave in 1857. No mere resolution of the board can interfere with the enjoyment she has had for ten years.

[BOVILL, C.J., referred to Gibson's Codex, 453, 454, and 1 Burn's Eccl. Law, 272, 273.]

That which was done here under the orders of Mrs. Robotham may be justified under the obligation imposed on her by the grant, to keep "the grave with the appurtenances" in repair.

Powell, Q.C., in reply. Nothing is conveyed by this grant but the exclusive right of burial: no interest in the soil passed: *Bryan* v. *Whistler*. (1) Nor was any right of planting granted.

[WILLES, J. The 33rd section was probably intended to meet the difficulty suggested in *Bryan* v. *Whistler*. (1)]

(1) 8 B. & C. 288.

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BOVILL, C.J. I am of opinion that the decision of the magistrates was correct. The burial board had power by s. 33 of the 15 & 16 Vict. c. 85, under such restrictions and conditions as they thought proper, to sell the exclusive right of burial either in perpetuity or for a limited period, and also the right of erecting and placing any monument, gravestone, tablet, or monumental inscription in such burial ground. Having this extensive power, the board might impose any restrictions in their grants which they thought fit. When application was made by Mrs. Robotham, in 1857, for a grant of a grave for the burial of her husband, the board granted her that right subject to very limited restrictions or conditions. They grant and convey to her the right and privilege of making and constructing a private grave, and the exclusive rights of burial and interment therein when made, in all that piece of land (describing it), in perpetuity, for the purpose of burial and of erecting or placing therein a monument or stone. Then comes the condition,—"But, if such monument or stone with the appurtenances to be so erected or placed shall not from time to time be kept in repair by the owner, according to such rules, orders, and regulations as have been or shall from time to time hereafter be made by the board for the management and regulation of the cemetery, &c., this grant shall be void." What was actually done was, the construction of a private grave, with a headstone and a kerb round the sides, the space over the grave being uncovered. It seems to me that the grantee did precisely that which the grant authorized her to do. She was bound to repair. The degree of repair must in all cases depend upon the nature of the thing to be repaired. All that was required here was that the grave should be so kept as not to offend against decency. If what she did was not calculated so to offend, she was entitled to do it. Suppose a man has the exclusive right to a pew in a church, subject to a liability to keep it in repair: he would be entitled to place therein lining, cushions, and a carpet, not because he has a freehold in the pew, but because he has an exclusive right of occupation. So of an exclusive right to a grave: the grantee would be entitled to plant it, provided she did nothing that was offensive or unsightly. If I could have felt any doubt or difficulty in the matter, it would be very much removed by what

Mrs. Robotham has from time to time been allowed without objection to do. Having erected the head-stone and kerb, she employed the respondent's husband, a gardener, to plant the intervening space with flowers and shrubs, and he or his agent continued to plant and trim these down to the year 1867, when the present movement was made by the burial board. That is strong to shew what was the understanding of the parties. If the grant is susceptible of the construction which I put upon it, the board clearly had no right to make regulations to interfere with that which they had granted in perpetuity. I think the conviction was quite right.

WILLES, J. I am of the same opinion. The question seems to me to turn upon the grant made by the burial board in 1857. In construing that grant, I think no regard should be paid to the latter clause in it; for, any subsequent regulations made by the board which would interfere with the right granted, would be repugnant and void. They may make general rules and regulations for the mangement of the cemetery, but not special rules which would derogate from prior grants. That the grant of 1857 conveyed the right in question, is clear. There are two sorts of burial. One is the common-law right which every man has to be buried in the churchyard of the parish where he dies: Com. Dig. Cemetery (D.). That right is not an exclusive one. But there is another right which is exclusive, viz. the right of exclusive burial in a particular spot, which is granted by licence or faculty, and cannot, according to *Bryan* v. *Whistler* (1), be granted by a rector by parol. That is just the exclusive right created by the burial board under this act of parliament. The effect of the grant is to appropriate to the grantee a particular place of burial, and to convey to him the exclusive right of burial in that place. Any difficulty which might have arisen from the rector's right to the profits of the churchyard, is entirely excluded by the character filled by the burial board. The cemetery is vested in them only for the public benefit. The grantee of this grave might have covered the whole space with a monument or a slab, which she would be entitled and perhaps bound to keep in repair: or she might do as she has done, viz. place a head-stone and a kerb, leaving the intervening space un-

(1) 8 B. & C. 288.

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covered; and this she would have to keep in repair. Planting and renewing the plants as they perish may fairly come within the word "repair," as applied to such a state of things. I cannot understand why she might not plant the grave, as is decent and has been usual for centuries. Nor is this any new notion, or a notion derived merely from ancient books; but it is quite in accordance with our own experience. Whenever memorials are allowed to be put up, they are always allowed to be repaired and decorated, even in places of worship. In Com. Dig. Cemetery (C.), it is said that, "if any one pull down or deface a tomb-stone or monument, the heir may have an action for it. So, if any deface the arms, pennons, &c., put up in a window or elsewhere in honour of his ancestor;" for which is cited, Co. Litt. 18. b. *Spooner* v. *Brewster* (1) is a modern instance of an action being maintained for wrongfully removing and defacing a tomb-stone. The proper conclusion appears to me to be that the grant in question is, not merely a right to exclusive burial in perpetuity, but also of a licence to do all that was proper and reasonable to keep the grave in a decent state of repair. Mrs. Robotham appears to have done nothing more; and the respondent acted with her authority.

BYLES, J. I am of the same opinion. Upon an appeal from the decision of justices, we must assume that they had before them all facts necessary to enable them to arrive at a conclusion. I take it, therefore, it appeared that St. Pancras is a very populous parish. There is no evidence as to what was done between the years 1857 and 1867; but there is abundant evidence of what the practice was in 1857. Ordinary parishioners who had a right to be buried in the cemetery were entitled to occupy the land until time destroyed their bodies, so as to make room for a succeeding generation. But this was a grant, for a valuable consideration, of the exclusive right of interment in a private grave in perpetuity, the surface being applicable to the erection of a monument or tomb-stone or to the cultivation of shrubs and flowers. One of the notions of value which surviving relatives would put upon a grant of this sort would be, that they might plant the grave with their own

(1) 3 Bing. 136.

hands, and from year to year renew the flowers. That was the usage at the time of the grant; and the board had no power to derogate from it. The decision will be affirmed with costs.

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Decision affirmed, with costs.

Attorney for appellant: *W. Durrant Cooper.*
Attorney for respondent: *W. T. Ricketts.*

THE METROPOLITAN BOARD OF WORKS, APPELLANTS; CLEVER, RESPONDENT.

June 24.

Metropolis Management Amendment Act, 1862 (25 & 26 *Vict. c.* 102), *s.* 98—*New Street.*

Section 98 of the Metropolis Management Amendment Act, 1862, provides that no existing roadway of a width less than 40 feet shall be laid out for building as a street for carriage traffic, unless such road be widened to the width of 40 feet, taken half on either side of the centre of the roadway.

The respondent was the owner of land upon which he had in 1866 erected some houses, the gardens in the rear of which abutted upon an ancient lane, and some of the owners of land adjoining this lane had in 1867 begun to form it into a street for carriage-traffic, within the meaning of s. 98 of the Metropolis Management Amendment Act, 1862. The respondent himself had done no act towards forming or laying out the lane as a street for the purposes of carriage-traffic, otherwise than by the removal in 1866 of an old bank and thorn fence and the substitution of an oak fence three feet within his own land, nor had he any intention of doing any such act, or of putting up any building fronting towards the lane:—

Held, that he had not committed any offence against the act: and was not bound to set back his oak fence, so as to leave a space of 20 feet between it and the centre of the lane.

APPEAL against a decision of a police-magistrate, under the 20 & 21 Vict. c. 43.

1. The respondent is the lessee for a long term of years of certain property situate on the south side of Hither Green Lane, near to the Lewisham and Bromley Road, Lewisham.

2. The respondent's property is bounded on the north by Hither Green Lane, and on the south by a road called Ladywell Park Road.

3. Hither Green Lane is a road which has been from time immemorial a public highway, and has been from time to time repaired by the parish authorities. It is of irregular width, being

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19 to 20 feet wide in some places, and increasing to 23 to 24 feet in others, but in no part exceeding 25 feet.

4. Hither Green Lane has within the past year or thereabouts been formed and laid out for building as a street for the purposes of carriage-traffic.

6. The respondent has erected eleven houses on his land, and placed those houses so as to front the Ladywell Park Road, which is a new road laid out for building purposes. The respondent's houses have long narrow strips of garden behind extending to the Hither Green Lane, from which they are divided by an oak park-fence, with a gate to each, affording an approach from and exit to the Hither Green Lane.

7. The respondent's houses were completed about 1866; and at that time the respondent's land was divided from Hither Green Lane by a bank and thorn fence thereon. When the houses were completed, the respondent caused the fence to be grubbed up and the bank to be levelled, and set the line of the present oak fencing about three feet within the outermost edge of the old bank.

8. The defendant's oak fencing was placed several feet within the distance of 20 feet measuring from the centre of the roadway along a line drawn at right angles to the course of the street.

9. The respondent has himself done no act towards forming or laying out Hither Green Lane as a street for the purpose of carriage-traffic, otherwise than so far as the removal of the old thorn fence, and erection of the oak park-fence, may be such act; nor has he any present intention of doing any such act, or putting up any building fronting towards Hither Green Lane.

10. Copies of the information (to recover penalties from the respondent for contravening the statute) and complaint and summons thereon, and of the bye-law referred to, were set out in an appendix, which was to be taken as part of the case. (1) The bye-law

(1) The bye-law as to the formation of new streets in the metropolis, made pursuant to the statute on the 1st of May, 1857, applicable to the case, was as follows:—

2. Forty feet at least shall be the width of every new street intended for carriage-traffic; twenty feet at the least shall be the width of every new street intended only for foot-traffic: Provided that the said widths respectively shall be construed to mean the width of the carriage and foot-way, exclusive of any gardens, forecourts, open areas, or other

was duly made by the appellants in pursuance of their powers, and its validity was not disputed.

11. The appellants contended that, on the above facts, the magistrate ought to have convicted the respondent; that s. 98 of the 25 & 26 Vict. c. 102 (1) clearly contemplates the street being made the full width of 40 feet, measuring 20 feet on each side of the centre line of the roadway to the nearest external wall, fence, or boundary of the houses or land on each side of the street; that, for the purposes of the act, the part, whether wall or fence or building, abutting on the street is to be deemed the front, although the same plot of land may also abut on another street, and although a house or building fronting the last-mentioned street may be erected thereon; that there need be no act by or intention

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spaces in front of the houses or buildings erected or intended to be erected in any street.

4. The measurement of the width of every new street shall be taken at a right angle to the course thereof, half on either side from the centre or crown of the roadway, to the external wall or front of the intended houses or buildings on each side thereof; but, when fore-courts or other spaces are intended to be left in front of the houses or buildings, then the width of the street as already defined shall be measured from the centre line up to the fence railing or boundary dividing or intended to divide such fore-courts, gardens, or spaces from the public way.

8. In case of any breach of the regulations contained in this bye-law, the offender shall be liable for each offence to a penalty of 40*s*., and, in case of a continuing offence, to a further penalty of 20*s*. for each day after notice thereof from the board.

(1) Which enacts, amongst other things, that "no existing road, passage, or way being of a less width than 40 feet shall be hereafter (i.e. from the 7th of August, 1862) formed or laid out for building as a street for the purposes of carriage-traffic, or of foot-traffic only, respectively, unless such road, passage, or way be widened to the full width of 40 feet or of 20 feet respectively, the measurement of such width being taken half on either side from the centre or crown of the roadway to the external wall or front of the houses or buildings erected or intended to be erected on each side thereof; but, where forecourts or other spaces are intended to be left in front of the houses or buildings, then the width shall be measured up to the fence or boundary dividing or intended to divide such forecourts or spaces from the public way; and such streets respectively shall be open at both ends from the ground upwards: And any road, passage, or way hereafter to be formed or laid out for either of the purposes aforesaid shall be deemed to be a new street, and become subject to all the provisions of the statutes for metropolis management, and to the provisions and penalties of and under any bye-laws made or to be made in pursuance thereof in relation to sewage, drainage, or paving, or to width, construction, surface inclination, and other requirements and particulars."

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of the particular owner to form or lay out his land for building purposes; but that, if the old road be in fact formed or laid out for building purposes as a street for carriage-traffic, all the land on each side situate within 20 feet of the centre line or crown of the roadway must be laid into the new street as formed for building.

12. The respondent contended, on the other hand, that, unless and until some act of user or intention to build happen or exist on the part of the individual owner of land fronting the new street, or unless or until he do some further act than that above detailed to lay out or concert in laying out such street, he is not liable to be called upon to set back his fence, leaving a space of 20 feet between it and the centre or crown of the roadway; and that, particularly in the present case, as his houses front to the Ladywell Park Road, the provisions of s. 98 and of the bye-law do not extend to compel him to set the oak fencing back to the required distance; nor was he to be forced thus to give up and throw into the new street so much of his property as lay between the existing boundary and the line of 20 feet measuring from the centre or crown of the roadway in Hither Green Lane.

The magistrate was of opinion that the respondent was not liable to a penalty, and refused to convict.

The question for the opinion of the Court was, whether the line of the respondent's oak fencing ought to be set back to a distance of 20 feet measuring southward from the centre line or crown of the roadway in Hither Green Lane. If the Court should be of opinion in the affirmative, the respondent was to be convicted in the penalty of 40*s.*; but, if the Court should be of opinion in the negative, the decision of the magistrate was to be affirmed.

Philbrick, for the appellants. The 98th section of the 25 & 26 Vict. c. 102 contemplates the formation of new streets of a uniform minimum width of 40 feet, if intended for carriage-traffic. The case finds, in par. 4, that the lane in question has within the past year been formed and laid out for building as a street for the purpose of carriage-traffic.

[WILLES, J. By whom laid out? The case does not inform us.]

By the owners of the lands abutting on it. Whether or not an old road is laid out for a new street, is always a question of fact for

the magistrate: per Blackburn, J., in *Taylor* v. *Metropolitan Board of Works.* (1)

[WILLES, J. Can it be said to be laid out as a new street until all the owners of land have agreed?]

There is no hardship in saying that the majority shall bind. And that evidently was the intention of the legislature. A great improvement is not to be frustrated by the obstinacy of an individual. Each proprietor, in return for what he may be called upon to give up, gets the advantage of frontage on a properly laid out street. In order to enable the board to put the act in force, it surely cannot be necessary that a step should be taken by the individual owner. This would render the act useless.

[WILLES, J. The respondent's frontage is not in Hither Green Lane, but in Ladywell Park Road. Where is the direction in the act to authorize the removal of an old fence?

BYLES, J. The appellants, no doubt, rely upon the fact stated in par. 9, viz. the removal by the respondent of the old thorn fence, and the substitution of one of oak.]

Notwithstanding the case of *Metropolitan Board of Works* v. *Cox* (2), the circumstance of the respondent's houses not fronting on Hither Green Lane makes no difference. The magistrate in that case found that the lane in question had not been formed or laid out as a street. This is by no means new legislation. Large powers are given to the surveyors under the 75th section of the act, as well as under the 18 & 19 Vict. c. 120, to set back premises, in order to preserve uniformity in the line of frontage. Every individual must yield to the common benefit.

Codd, for the respondent. *Metropolitan Board of Works* v. *Cox* (2) is directly in point. Byles, J., there says: "The respondent has not laid out Hob Lane as a street for carriage-traffic. He has done nothing to Hob Lane." So, here, the magistrate has expressly found (in par. 9) that the respondent has done no act towards forming or laying out this lane as a street for the purposes of carriage-traffic, nor has he any present intention of doing so. In *Taylor* v. *Metropolitan Board of Works* (1), the appellant had begun to build, and so to form and lay out the road. It was a question of fact for the magistrate, and the Court will not interfere

(1) Law Rep. 2 Q. B. 213. (2) 19 C. B. (N.S.) 445.

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with his decision. S. 98 seems to assume that the buildings must front the street.

Philbrick, in reply. In *Metropolitan Board of Works* v. *Cox* (1), the magistrate expressly found that the respondent had not formed or laid out Hob Lane for building as a street for carriage-traffic. Here the respondent has removed the old fence, and substituted a new one. In *Reg.* v. *Fulford* (2), upon the trial of an indictment framed on the Local Government Amendment Act, 1861 (24 & 25 Vict. c. 61, s. 28), for bringing forward a house in a street beyond the front wall of the houses on either side, without the consent of the local board of health, it was held to be a question of fact for the jury whether the houses formed a street.

WILLES, J. I am of opinion that the decision of the magistrate was right and ought to be affirmed. That will be abundantly clear when the frame of s. 98 of the 25 & 26 Vict. c. 102, is considered. That section imposes such a penalty as is provided by any bye-law made under the Metropolitan Management Acts. For what? For violating the enactment. What is the enactment? It is that no existing road being of a less width than 40 feet shall be hereafter formed or laid out for building as a street for the purposes of carriage-traffic, unless such road be widened to the full width of 40 feet, the measurement of such width being taken half on either side from the centre or crown of the roadway to the external wall or front of the houses or buildings erected or intended to be erected on each side thereof, or up to the fence or boundary. Who breaks that enactment? If in the terms of the finding in par. 4 of the case the roadway has been formed and laid out for building as a street for the purposes of carriage-traffic, the person who has formed and laid it out, or concurred in so doing, is the offender. In order to enforce a penalty under the act, it is not sufficient to shew an offence committed: we must have before us the person who has committed the offence. Has this respondent done so? The 9th paragraph finds that the respondent has himself done no act towards forming or laying out Hither Green Lane as a street for the purposes of carriage-traffic, otherwise than so far as the removal of the old thorn fence and erection of the oak park-fence

(1) 19 C. B. (N.S.) 445. (2) 33 L. J. (M.C.) 122.

may be such act, nor has he any present intention of doing any such act or putting up any building fronting towards Hither Green Lane. All he has done therefore is, to throw a small portion of his property into the road. If any offence against s. 98 or the prohibition of the bye-law has been committed, it clearly has not been committed by the respondent. This appears to have been the view taken in *Taylor* v. *Metropolitan Board of Works.* (1) Referring to the judgment of my Brother Blackburn in that case, it would seem that the person convicted there was the person who had an intention to build on the line of the new street. For these reasons, I think the decision of the magistrate must be affirmed, and with costs.

BYLES, J. I am of the same opinion. The respondent is the owner of a plot of land the rear of which abuts upon an old lane which some one had begun to lay out as a street. The case finds that the respondent has not and never had any intention to build on or do any act towards forming or laying out the street. It finds that some other person, probably more than one, had such an intention. We cannot take away any part of a man's land, unless the plain words of an act of parliament require us to do so. I find in this act of parliament no such words. The case of *Metropolitan Board of Works* v. *Cox* (2) seems to me to be an authority directly in point.

Decision affirmed, with costs.

Attorney for appellants: *W. Wyke Smith.*
Attorney for respondent: *C. Stroughill.*

(1) Law Rep. 2 Q. B. 213. (2) 19 C. B. (N.S.) 445.

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July 6.

BRADLAUGH *v.* DE RIN.

Bill of Exchange—Invalid Indorsement in France of Bill drawn there and accepted in England.

A bill of exchange was drawn in France upon and accepted by the drawee in London, and indorsed in France, but not so as to convey to the indorsee according to the French law any property in or right to sue upon the bill there in his own name:—

Held, per Bovill, C.J., and Willes, J. (Montague Smith, J., dissenting), that the acceptor was not liable to an action in this country at the suit of the indorsee.

Trimbey v. *Vignier* (1 Bing. N.C. 151) and *Lebel* v. *Tucker* (Law Rep. 3 Q.B. 77) discussed.

Reversed in Ex. Ch. 5 C.P. 473,

DECLARATION on three bills of exchange by indorsee against acceptor.

Pleas, traversing the acceptance and the indorsements.

The cause was tried before Montague Smith, J., at the sittings in London, after last Michaelmas Term. It appeared that the bills were drawn in France upon the defendant in England, and were there accepted by the defendant. The last indorsement upon each of the bills was made in France, and was in blank. It was proved that such an indorsement was not valid by the law of France, and that it did not transfer any property in, or right to sue upon, the bills according to the law of France, but only amounted to a procuration, and that the plaintiff would not be the proper person to sue upon the bills in France. It was thereupon contended on the part of the defendant that, the bill being a French bill, the right of an indorsee to sue upon it could only be created by an indorsement valid by the law of France.

A verdict was taken for the plaintiff, subject to leave reserved to the defendant to move to enter the verdict for him.

Keane, Q.C., in Hilary Term last, obtained a rule nisi.

Lumley, in Trinity Term, shewed cause. The bills, though drawn abroad, were English bills. They were directed to the drawee in England, and were by him accepted generally in England; consequently an indorsement good according to the English law was sufficient to enable the indorsee to sue upon them

here. The interpretation of a contract is governed by the place where the contract is made: the mode of suing must be governed by the law of the country where it is sought to be enforced. In *Trimbey* v. *Vignier* (1), where a promissory note was made by the defendant in France, and there indorsed in blank by the payee, the maker and payee both at the times of making and indorsing the note being domiciled there, it was held that, as no action could have been maintained upon the note in the French courts of law in the name of the indorsee, the indorsement according to the law of France operating as a procuration only, and not as a transfer, so no action could be maintained by him in our courts. But, in *Lebel* v. *Tucker* (2), where the bill was drawn, accepted, and payable in England, it was held that a blank indorsement made in France by a person domiciled there enabled the indorsee to sue the acceptor in this country. That case would have been exactly in point but for the fact that these bills were drawn in France. But, for the purpose of charging the acceptor, that fact makes no difference. In Story on Bills, s. 131, it is said: "In respect to foreign bills of exchange, they are generally, as to their validity, nature, interpretation, and effect, governed by the laws of the state or country where the contract between the particular parties has its origin. The contract of the *acceptor* is governed by the law of the place of his acceptance, as to the drawer, the payee, and every subsequent holder, unless he accepts in one place payable in another place; for, in the latter case, the law of the place where the bill is payable will govern in regard to the same parties." In s. 133, dealing with *Trimbey* v. *Vignier* (1), the learned author says: "The Court on that occasion said that the question as to the transfer was a question of the true interpretation of the contract, and was therefore to be governed by the law of France, where the contract and indorsement were made." Here, however, the contract of the acceptor is governed by the law of the place of acceptance and payment. Lush, J., in *Lebel* v. *Tucker* (3), says: "The judgment in *Trimbey* v. *Vignier* (1) proceeds on the ground that the contract, that is, the contract of the maker of the note, having been made in France, must be governed by the law of France.

(1) 1 Bing. N. C. 151. (2) Law Rep. 3 Q. B. 77.
(3) Law Rep. 3 Q. B. at p. 85.

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So here, the contract of the acceptor, having been made in England, must be governed by the English law. It would be anomalous to say that a contract made in this country could be affected by the circulation and negotiation in a foreign country of the instrument by which the contract is constituted. The original contract cannot be varied by the law of any foreign country through which the instrument passes." And see Byles on Bills, 8th ed. 370.

[WILLES, J., referred to *Hirschfeld* v. *Smith* (1), where Erle, C.J., says: "As regards the protest and notice of dishonor, the place where the bill is payable governs."]

In *Lebel* v. *Tucker* (2), Lush, J., says: "The contract of the acceptor, if expanded in words, is, 'I undertake at the maturity of the bill to pay the person who shall be the holder under an indorsement from you, the payee, made according to the law-merchant.' How can that contract of the acceptor be varied by the circumstance that the indorsement is made in a country where the law is different from the law of England? The bill retains its original character; it remains an inland bill up to the time of its maturity, and is negotiable according to the English law."

[WILLES, J., referred to Nougier des Lettres de Change, vol. i. p. 364, § 412, (3)]

12 Jur. N.S. 523.

(1) Law Rep. 1 C. P. 340, 349.

(2) Law Rep. 3 Q. B. at p. 84.

(3) The passage referred to is as follows:—"Le Code de Commerce contient une lacune qu'il est important de signaler. Aucune de ses dispositions ne détermine le cas que l'on doit faire, en France, d'effets négociables passés à l'étranger, et couverts d'endossements conçus dans des formes particulières. Sur ce point, cependant, des règles précises étaient indispensables; car d'embarrassantes questions peuvent s'élever. Dans le silence de la loi, il faut recourir aux principes généraux du droit et aux usages commerciaux. Une maxime domine toute la matière; c'est celle qui dit que Locus regit actum. Quand il s'agit de mariages, de testaments, ou d'autres contrats fait en pays étrangers, la loi particulière du lieu règle la forme particulière de l'acte, qui est valable en France pourvu qu' on y retrouve les conditions substantielles et d'ordre public. Pareillement dans les lettres de change, qui sont des actes du droit des gens, il est juste de faire l'application de cette maxime, de tenir compte des législations étrangères, et de les admettre avec leur formes spéciales, lorsque l'on y rencontre les caractères qui sont de rigueur chez nous. Dans les endossements, les formalités prescrites sont arbitraires, en ce sens qu'on peut les modifier sans altérer le contrat de change et sans le détruire. Par exemple, la date est voulue en France; dans certains lieux, son omission est autorizée; un endossement venant sans date de l'un de ces lieux, aurait cours et

Keane, Q.C., and *C. W. Wood*, in support of the rule. If the bills in question had been accepted as well as drawn in France, the bill would have been a foreign bill, and the law of France would govern the case: *Trimbey* v. *Vignier*. (1) *Lebel* v. *Tucker* (2) proceeds upon the ground that the bill was entirely an inland bill, and therefore an indorsement valid according to the law of England was sufficient to pass the property as well as the right to sue here. These bills, however, though accepted in England, must clearly be treated as foreign: Byles on Bills, 8th ed. 379. The contract of the acceptor is, to pay the bill to the drawer or to one holding under a legal indorsement. If these bills are to be treated as foreign bills, the judgment of this Court in *Trimbey* v. *Vignier* (1) applies.

[MONTAGUE SMITH, J. In *Rothschild* v. *Currie* (3), the bill was drawn in England, in favour of the defendant, on a house in Paris, and payable there. The defendant indorsed it to the plaintiff, both being domiciled in England. And the Court say that, as it is a French bill, they ought to be guided by the law of France. Here, the bills were drawn in France, but accepted and payable here. They are therefore English bills.]

In that case the question turned upon whether or not there had been due notice of dishonour. Here, the plaintiff's title to sue, if acquired at all, is acquired in France, and therefore he can have no title if none is acquired by the law of France. In Story's Conflict of Laws, § 316*a*, the author, after stating what is required in France to make an indorsement a valid transfer, says: "Now, let us suppose a note made in Paris, payable to the order of the payee, and he should there indorse the same in blank, without the prescribed formalities, and afterwards the holder should sue the maker of the note in another country, for example, in England, where no such formalities are prescribed; the question would arise whether the holder could recover in such a suit in an English court upon such an indorsement. It has been held that he cannot." He then cites *Trimbey* v. *Vignier* (1), and proceeds: "And

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valeur, parceque l'omission n'empêche pas le contrat de change, et que l'endossement n'est qu'un mode de cession indépendant de la perfection de la lettre."

(1) 1 Bing. N. C. 151.

(2) Law Rep. 3 Q. B. 77.

(3) 1 Q. B. 43.

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this decision seems to be founded in the true principles of international jurisprudence; for, it relates, not to the form of the remedy, but to the interpretation and obligation of the contract created by the indorsement, which ought to be governed by the law of the place of indorsement." The judgment of Lush, J., in *Lebel* v. *Tucker* (1), properly understood, is in the defendant's favour.

Cur. adv. vult.

July 6. The judgment of Bovill, C.J., and Willes, J., was delivered by

WILLES, J. This was an action by the alleged indorsee of a bill of exchange drawn in France upon and accepted by the defendant in England, and in France indorsed in blank to the plaintiff, who sued thereon in his own name, and had a verdict, subject to leave reserved to enter a nonsuit, upon the ground that, by the law of France, an indorsement in blank does not transfer any property in or right to sue upon the bill, but amounts to a procuration only, according to the 138th article of the Code de Commerce. A rule was accordingly granted, and the question was argued last term, before the Lord Chief Justice, Mr. Justice Montague Smith, and myself, when we took time to consider.

Where a bill is accepted as well as drawn in France, there, according to *Trimbey* v. *Vignier* (2), the law of France must prevail, and the indorsement in blank is insufficient to give a right of action here. Where the bill is drawn as well as accepted in England, there, according to *Lebel* v. *Tucker* (3), the indorsement in blank is valid for all purposes here.

The present is an intermediate case, the acceptance being English, but the bill being a French bill in its inception, and, according to our law, considered foreign for the purpose of protest, so that, without formal protest by a notary, no action could be maintained against the drawer (see Byles on Bills, 9th ed. 209), as it can upon an inland bill upon simple presentment and notice of dishonour. And, as against the drawer, there can be no doubt that the general rule, that the formalities of acts are governed by the

(1) Law Rep. 3 Q. B. 77. (2) 1 Bing. N. C. 151.
(3) Law Rep. 3 Q. B. 77.

law of the place (locus regit actum), would apply, and that a blank indorsement was therefore insufficient to transfer the bill or to give a right of action.

The argument for the plaintiff was, in effect, that the contract of the acceptor was, to pay to any person holding the bill by indorsement in the form sufficient by the English law, and that he was entitled and liable to pay accordingly.

On the part of the defendant it was answered, that the acceptor is no doubt entitled to pay upon a blank indorsement, because it amounts to a procuration, at all events until countermand and notice; but that he can only be liable to an action either at the suit of the drawer or a person claiming under the drawer by an indorsement which as against the drawer transfers the right to the bill; that his contract is, to pay the drawer or the person to whom the drawer has made a valid transfer of his rights; that no intention to make such transfer can in this case be imputed to the drawer; and that, without such intention, the mere writing of his name is inoperative: *Marston* v. *Allen*. (1)

Upon consideration, the Lord Chief Justice and myself think the arguments for the defendant must prevail. No authority was cited, nor can we find any, to shew that there may be a partial indorsement of a bill of exchange. It certainly cannot be indorsed so as to allow of an action by the indorsee for part of the amount, and by the indorser as to the residue. The indorsement must be good for the whole or none. And the same rule against splitting the liability upon the bill by a partial indorsement (see Byles on Bills, 9th ed. 167) seems equally to forbid an indorsement which shall be effectual to transfer the right of action against the acceptor, but not the drawer's right to the bill or any action against him. The indorsement of a bill without recourse, though it give no right of action against the indorser, does transfer all his right of action upon the bill, and is therefore no exception to this rule. It would be anomalous that, in case of a French draft, the alleged indorsee should be able to sue in England as upon a transfer from the French drawer in France, when the drawer is not bound by such indorsement, and might sue in his own name, treating the possession of the alleged indorsee as that of his agent.

(1) 8 M. & W. 494.

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The Lord Chief Justice and myself are, for these reasons, of opinion that the case is governed by *Trimbey* v. *Vignier* (1), and that the rule for a nonsuit ought to be made absolute.

MONTAGUE SMITH, J. This action is brought by the holder against the acceptor of a bill of exchange drawn in France and accepted in England; and the question arises whether one of the indorsements of the bill made in France, not in accordance with the law of France, but sufficient according to the law of England, is a good indorsement as against the acceptor. I think it is.

The contract of the acceptor is made here, and is to be performed here; and, according to well-known principles, the contract of the acceptor would be governed by the law of England, unless there is something in the nature of the contract on a bill of exchange which creates a difference. Now, the contract of the acceptor is made with the drawer to pay the bill at maturity to him or his payee or indorsee (as the case may be), or to the ultimate indorsee or holder. The original contract to pay no doubt passes, by the law merchant, by assignment. Superadded contracts may and do arise between the indorsers and those taking from them, inter se; but the original contract remains as against the acceptor. That contract in this case is an English contract; and it seems to me the drawer and the indorser transfer it as an English contract, and can confer by transfer no right to any indorsee to treat it otherwise than as an English contract, as against the acceptor. If so, it then comes to the question what the English contract of the acceptor really is. Is it a contract to pay upon indorsements good by the law of France? or good by the law of the country where the indorsements happen to be made? or upon indorsements good and sufficient by English law? It seems to me the last is the contract, and that the acceptor agrees to pay to whomsoever is constituted the holder according to English law. I cannot think that the fact that the bill was drawn in France, and not in England, makes an essential difference on this point. It was an accident that the indorsement in question was made in France. Suppose this bill had been indorsed at Vienna, what law was then to prevail? It might be the law of Austria, but it would

(1) 1 Bing. N. C. 151.

not, I apprehend, be the law of France. The real question seems to resolve itself into this, whether the manner of indorsement of a bill accepted in England and payable here, is to be governed by the law of the foreign country where it happens to be made, or by English law. This point appears to have been decided by the Court of Queen's Bench, in the late case of *Lebel* v. *Tucker* (1), where it was held that an indorsement made in France of a bill drawn and accepted in England, and which was invalid by French law, but sufficient according to English law, entitled the indorsee to maintain an action against the English acceptor. It is true that, in that case, the bill was drawn in England; but there does not seem sufficient reason for holding that that fact constitutes the essential distinction with regard to the sufficiency of an intermediate indorsement, as against the acceptor. It would seem that either the law of the country where the bill is accepted and payable, or where it is indorsed, must prevail; and the Court of Queen's Bench has held that the former law governs.

Agreeing, as I do, with that decision, and thinking that in substance it governs this case, I do not consider it necessary to go through the authorities which were cited before that Court.

I should have given this judgment with more hesitation, opposed as it is to that of my Lord and my Brother Willes, but for the support which I think it receives from the decision of the Court of Queen's Bench. I own also I give it with less reluctance than I should otherwise feel, because it seems to me that it would place the acceptors of bills in a position of great difficulty and peril, if the law of the country of the indorsement, whatever it may be, and not the law of the place of acceptance and payment, is to govern.

For these reasons, I think the plaintiff is entitled to keep his verdict, and that the rule ought to be discharged.

Rule absolute to enter a nonsuit.

Attorneys for plaintiff: *Heath & Parker.*
Attorneys for defendant: *Lewis & Watson.*

(1) Law Rep. 3 Q. B. 77.

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RIXON AND ANOTHER, EXECUTORS OF THOMAS FARNCOMB, DECEASED, *v.* JAMES EMARY AND FRANCES EMARY.

Debtor and Creditor—Bankruptcy Act, 1861 (24 & 25 *Vict. c.* 134), *s.* 192—*Composition Deed—Joint and separate Creditors—Pleading—Departure.*

4 C.P. 263.

To an action on a promissory note, the defendants James and Frances pleaded a deed under s. 192 of the Bankruptcy Act, 1861, whereby, after reciting that they had carried on business in partnership, all their property was assigned to trustees in trust to pay a composition to the joint creditors of the two and to the separate creditors of James; and the plea averred that the requisite majority in number and value of the joint creditors of the two defendants and of the separate creditors of James had assented to the deed; that there were no separate creditors of Frances; and that all things had been done to make the deed binding on all the creditors.

The plaintiffs replied, setting out the promissory note declared on, which was the joint and several note of the two defendants,—the defendants rejoined that the note was given on account of and by way of security for a debt due to the plaintiffs from the defendants jointly. On demurrers to the pleas and replications and rejoinders respectively:—

Held, by Byles, Keating, and Montague Smith, JJ. (Bovill, C.J., dissenting), that, there being no separate creditor of Frances distinct from the joint creditors, but only a liability on her part to be sued separately upon a note given by way of security for a joint debt, the deed, which discharged the joint debt, necessarily discharged the several liability also.

Held, by Bovill, C.J., that the effect of the note being to create a separate legal debt on the part of Frances, the deed was no discharge as to that debt; and that, as the deed did not bind all the creditors, it did not bind any non-assenting creditors.

Held, further, that the replication was no departure, as it did not set up the separate liability as the cause of action, but only for the purpose of defeating the plea, and thus maintaining the cause of action stated in the declaration.

DECLARATION upon a promissory note, whereby the defendants promised to pay to Thomas Farncomb (the plaintiff's testator), 500*l.*, with interest. Also counts for money lent, money paid, interest, and accounts stated.

The defendants severed in their defence, but pleaded substantially in the same manner. The fourth plea set up a deed under s. 192 of the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), made between James Emary of the first part, Frances Emary of the second part, trustees of the third part, and "the several persons, companies, and partnership firms who are creditors of James Emary, or who would be entitled to prove under the adjudication of bankruptcy against him had such been made on the day of the

date of these presents," of the fourth part. This deed recited that James Emary had for some time past carried on business and had become indebted and unable to pay in full; that until a recent period he had carried on the business of an hotel-keeper jointly with his sister Frances Emary, and the lease of the hotel was the joint property of James and Frances Emary; that Frances Emary had lately by deed assigned all her share and interest in the lease and in all other the property which belonged or was considered to belong to her jointly with James Emary, and in connection with the hotel, to James Emary absolutely, in consideration of his covenant to pay all debts for which James and Frances Emary were or might be held jointly liable in respect of the business so carried on by them jointly; that those of the creditors to whom such last-mentioned debts were owing had agreed in consideration of the assignment thereinafter made by James Emary of all his estate (including the premises so assigned to him by Frances Emary) to release Frances Emary (she having no separate estate) from the same debts; and that James Emary had proposed to assign all his property to the trustees, upon trust to realize the same, and pay to the creditors respectively a composition of 8*s.* in the pound in full discharge of their respective debts. The deed then assigned to the trustees all the real and personal estate and effects of James Emary, upon trust to pay the composition, and the surplus, if any, to James Emary. In consideration of the assignment thereinbefore contained, the creditors released James Emary from the debts due to them: and, for the same consideration, such of the creditors as were creditors of James Emary and Frances Emary jointly in respect of the business carried on by them jointly, released Frances Emary from the debts due to such last-named creditors in respect of the last-named business." Proviso that the deed should not prejudice or affect the rights or remedies of the creditors against any surety, but nevertheless if such security should be enforceable against James Emary or his estate or effects, the creditor (unless he should consent to abandon his security) should be entitled to receive the composition upon so much only of his secured debt as might remain after such security should have been realized, or after credit should have been given for the full value thereof. The plea then averred that there were no separate creditors of Frances

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Emary, and that a majority in number representing three-fourths in value of the joint creditors of the defendants whose debts amounted respectively to 10*l.* and upwards, had in writing approved of and assented to the deed, and that a majority in number representing three-fourths in value of the separate creditors of the defendant James Emary whose debts amounted respectively to 10*l.* and upwards, had in writing approved of and assented to the deed; and then followed the usual averments as to execution, attestation, and registration of the deed and delivery of possession to the trustees, and performance of all conditions to render the deed valid, and to release the defendants.

Demurrer and joinder.

Replication, that the promissory note in the declaration mentioned was and is in the words and figures following, that is to say, "Hastings, March 26, 1856. We jointly and severally promise to pay," &c. (signed) James Emary, Frances Emary; and that the said James Emary and Frances Emary were the defendants.

Demurrer to the replication, on the ground that the deed releases the defendant, James Emary, from all his debts; and also on the ground that the replication was a departure from the declaration in setting up the defendants' separate liability on the note. Joinder in demurrer and issue.

Rejoinder, that the promissory note was made for and on account of, and as and by way of security for, a debt due to the plaintiffs from the defendants jointly in respect of the business formerly carried on by them jointly as aforesaid, and not for or on any other account or consideration whatsoever.

Demurrer on the ground that the rejoinder tended to raise an immaterial issue. Joinder.

Horace Lloyd, Q.C. (*Raymond* with him), for the plaintiffs. A deed of composition under s. 192 of the Bankruptcy Act, 1861, (24 & 25 Vict. c. 134), must embrace all creditors, separate as well as joint: *Andrew* v. *Macklin* (1); *Re Glen.* (2) The same principle had already been laid down in *Norton* v. *Shakespeare* (3), under the 5 Geo. 2, c. 30, s. 9, and in *Ex parte Calvert* (4), under the 12 & 13

(1) 34 L. J. (Q.B.) 89. 11 Jur. N.S. 409
(2) Law Rep. 2 Ch. App. 670.
(3) 15 East, 619.
(4) 27 L. J. (Bk.) 42. 4 Jur. N.S. 12

Vict. c. 106, s. 224. All the debtors and all the creditors must be bound by the deed. This deed, therefore, affords no defence, because the separate debt of Frances is not included in the deed. The deed therefore does not purport to bind all the creditors of the defendants, and consequently it does not bind any of the creditors who do not assent to it.

Brown, Q.C. (*H. James* with him), contrà. The deed releases the joint and separate debts of James Emary and the joint debts of Frances; and the plea avers that there were no separate debts of Frances at the date of the deed. The replication does not in terms traverse that, but states that the note declared on was a joint and several note of James and Frances. But, having elected to treat the note as joint by so declaring on it, the plaintiffs cannot retrace their steps, and now rely on it as creating a several liability in Frances. It would in effect be a departure: Com. Dig. Election (C. 2); Co. Litt. 146 a; *Ex parte Rowlandson* (1); *Ward* v. *Day* (2); 1 Ch. Pl. 50, 51.

Raymond, in reply.

Cur. adv. vult.

July 6. The judgment of the majority of the Court (Byles, Keating, and Montague Smith, JJ.) was delivered by

MONTAGUE SMITH, J. We are of opinion that the pleas fourthly pleaded by the defendants respectively are good. To the deed therein set out both the defendants are parties, and an assignment of property is made by the deed to trustees, in trust to sell, and to pay a composition of 8*s.* in the pound upon their debts to the joint creditors of the two defendants, and to the separate creditors of James, in discharge of such debts.

The pleas allege that Frances had no separate creditors, and also that the requisite majority in number and value of the joint creditors of the defendants, and of the separate creditors of James, had assented to the deed. It appears to us that this deed, under the circumstances alleged in the plea, is a valid deed, binding on all the creditors of the two defendants, under the 192nd section of the Bankruptcy Act, 1861, although it does not refer in express

(1) 3 P. Wms. 405.

(2) 4 B. & S. 337; 33 L. J. (Q.B.) 3, 254. 10 Jur (N.S.) 174

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terms to the separate creditors of Frances; for the plea avers that she had no such creditors.

The plaintiffs, in the replication to these pleas respectively, set out the promissory note on which the action is brought, which appears to be a joint and several note of the two defendants. The rejoinders to these replications allege that the note was given on account of and by way of security for a debt due to the plaintiffs from the defendants jointly, and on no other consideration: and the question which has been argued before us arises on the effect of the facts appearing in these replications and the rejoinders to them. It appears, in effect, that, although the note is joint and several, it was given by way of collateral security only for a joint debt. Now, the joint debt is clearly within the scope of the deed, and of the release contained in it: and, this debt being discharged by the release, it appears to follow that the joint and several liability on the note would be discharged also.

We entirely agree in the decision of the Lords Justices in the case of *Re Glen* (1), that, where there are distinct classes of joint and several creditors, the deed must include and bind both sets of creditors. In this case, however, there is no separate creditor of Frances distinct from the joint creditors; but a liability on her part to be sued separately upon a note which was given, not for a several debt, but by way of security only for the joint debt; and the deed, which deals with and discharges the joint debt, appears to us necessarily to deal with and discharge the several liability also.

The clause of the deed which preserves to the creditors the benefit of securities expressly exempts the two debtors from its operation; and we think their several liability on this note is included in the exemption, and is not preserved by this clause. The case, therefore, is not within the reason given by the Court in *Re Glen* (1) for holding the deed in that case void, viz. that one set of creditors would be bound by it, whilst another set would be free to take proceedings against the debtor. It should be observed also that the several liability on the note cannot affect the requisite majority in number and value of the creditors and debts, as on these pleadings it must be taken that the plaintiffs, and the

(1) Law Rep. 2 Ch. App. 670.

debt due to them, have been included in the calculation; and they cannot be reckoned twice.

For these reasons, we think the defendants are entitled to judgment on these demurrers.

BOVILL, C.J. I have the misfortune to differ from my learned Brothers in this case.

I consider the law to be now settled, that a deed of arrangement by several debtors with their creditors must, in order to be binding upon non-assenting creditors under the 192nd section of the Bankruptcy Act, 1861, purport to be made or entered into with and to bind *all* their creditors, and must embrace several as well as joint creditors, where any of each class exist. This was so decided by the Lords Justices in *Re Glen* (1), and by the Court of Queen's Bench in *Tomlin* v. *Dutton* (2), in Easter Term last: and I entirely concur in this construction of the statute.

The two defendants, James Emary and Frances Emary, are both parties to the deed set out in the pleas; and, in any view of the case, a sufficient proportion of the creditors assented to it: but the deed does not purport or profess to be made or entered into with or to bind the *separate* creditors of Frances, or to make provision for or release any debt for which she was liable to be sued separately.

The plea, it is true, contains an allegation that there were no separate creditors of Frances; and that allegation is, I think, sufficient to make the plea good. The replication, however, sets out the note upon which the action is brought, which is the joint and *several* note of the two defendants; and, although the rejoinder states that the note was made for and on account of, and as and by way of security for, a debt due to the plaintiffs from the defendants jointly in respect of their joint business, it seems to me that the effect of the note was to create a *separate* legal debt and liability on the part of Frances, upon which she was liable to be sued alone, and in respect of which, in the event of her bankruptcy, a proof might clearly have been made by the plaintiffs, if they thought fit, against her separate estate. If so, the plaintiffs may, I think, be considered as separate creditors of Frances; and

(1) Law Rep. 2 Ch. App. 670. (2) Law Rep. 3 Q. B. 466.

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the mere fact of this separate liability having been created as security for and on account of the previous joint debt, does not, as it seems to me, prevent its being still the separate debt of Frances, for the purpose of a remedy at law or proof in bankruptcy.

It was contended that the replication was a departure from the declaration; but I think there is no ground for that objection; the replication does not set up the separate liability as the cause of action, but only for the purpose of defeating the plea, and thus maintaining the cause of action upon which the declaration was originally framed.

I am also of opinion that nothing is shewn, by way of election or otherwise, to prevent the plaintiffs insisting upon the separate liability of the defendants respectively.

There is no allegation, as a matter of fact, that Frances had no separate estate (if it be material); and the recital in the deed to that effect cannot be used against the plaintiffs, unless the deed is otherwise shewn to be binding upon them.

The saving clause as to sureties and securities does not seem to me to apply to or to affect the present question; and, unless the separate creditors are bound, the deed has no operation as to joint debts. I think the case is not distinguishable in principle from *Re Glen* (1) and the case in the Queen's Bench; and that, as the deed does not purport to bind all, it does not bind any of the creditors who did not assent to it; that it leaves the separate liability of Frances created by the note entirely untouched; and that the plaintiffs are therefore entitled to the judgment of the Court.

Judgment for the defendants.

Attorneys for plaintiffs: *Rixon & Son.*

Attorneys for defendants: *Marshall, Westall, & Roberts.*

(1) Law Rep. 2 Ch. App. 670.

MORGAN AND ANOTHER *v.* THE METROPOLITAN RAILWAY COMPANY. 1868 *May* 25.

Mandamus—Notice to Treat—Lands Clauses Consolidation Act (8 & 9 *Vict. c.* 18), *s.* 18—27 & 28 *Vict. c. cccxv. s.* 13.

The Metropolitan Railway (Tower Hill Extension) Act (27 & 28 Vict. c. cccxv.), by s. 2, incorporates the Lands Clauses Consolidation Act, and by s. 13 provides that the company, before they enter upon or take any tenement under the powers of the act, shall give six months' notice of their intention to take such tenement to the person rated to the poor in respect of it. The Lands Clauses Consolidation Act (8 & 9 Vict. c. 18), s. 18, provides that the promoters of the undertaking shall give notice of their intention to take lands to all parties interested in them, and that such notice shall contain certain particulars. The Metropolitan Railway Company gave a notice to the plaintiff of their intention to take a tenement for which he was rated to the poor; the notice did not contain the particulars mentioned in s. 18 of the Lands Clauses Consolidation Act. In consequence of this notice the plaintiff took other premises, and his former ones remained on his hands unoccupied. The company having failed to proceed with the purchase of the lands after six months had elapsed, the plaintiff commenced an action against them for damages, and claimed a mandamus:—

Held, that the notice bound the company to proceed with the purchase of the tenement at the end of the six months, and that the plaintiff was entitled to a mandamus to compel them to do so.

Held also, that he was entitled to more than nominal damages.

Per Bovill, C.J. The notice, as against the company, was a sufficient compliance with the provisions of s. 18 of the Lands Clauses Consolidation Act.

THIS was a special case stated for the opinion of the Court without pleadings, and the material parts of which were as follows.

The plaintiffs were in the year 1865, and continued at the commencement of the action to be the lessees of a house, buildings, and premises, forming 38, Trinity Square, Tower Hill, for a term of twenty-one years from the 25th day of September, 1863, at the yearly rent of 150*l*. They were at the former time, and continued to be until the month of July, 1866, in the occupation of the house, buildings, and premises, and their names were in the rate book as assessed for the relief of the poor in respect thereof.

By the Metropolitan Railway (Tower Hill Extension) Act, 1864, the defendants were authorized to purchase and take, for the purposes of their undertaking, certain scheduled lands, including, among others, the premises of the plaintiffs above mentioned, and by the 13th section of that act it is provided as follows: "The company, before they enter upon or take any tenement under

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the powers of this act, shall give six months' previous notice of their intention to take such tenement to the person whose name shall be in the rate book as assessed for the relief of the poor in respect of such tenement, and delivery of such notice at such tenement shall be deemed sufficient service thereof." On the 17th day of November, 1865, the defendants served the plaintiffs with a notice, of which the following is a copy:—

"Metropolitan Railway (Tower Hill Extension).

"In pursuance of the provisions of the 13th section of the Metropolitan Railway (Tower Hill Extension) Act, 1864, the Metropolitan Railway Company hereby give you notice that it is their intention, on or after the expiration of six months from the service hereof, to enter on and take under the powers of their said act a certain tenement, numbered 6, in the parish of the precinct of the Tower Without, in the county of Middlesex, on the plan and book of reference deposited with the respective clerks of the peace of the county of Middlesex and for the city of London, with relation to the said act, and of which tenement you are the party assessed for the poor rate.

"Dated the 17th day of November, 1865.

"To Thomas Morgan and Francis Morgan, the person whose name is in the rate book assessed to the relief of the poor in respect of such tenement, and all else whom it may concern.

(Signed) J. HENCHMAN,
Secretary to the said company."

The premises to which this notice refers are No. 38, Trinity Square.

Upon the 26th day of March, 1866, the plaintiffs' solicitors gave notice to the solicitors to the defendants that the plaintiffs were about to obtain fresh premises in consequence of the notice they had received, and to hold the company responsible for all damages.

Shortly after the above notice was given the plaintiffs began to look out for other premises suitable for their business, and in the month of July, 1866, they took a lease of some premises in Clement's Lane, Lombard Street, to which they removed, and where they at the commencement of the action carried on their business. The premises of No. 38, Trinity Square, had since such

removal been vacant, and had not been used by the plaintiffs for any purpose, nor had they derived any benefit from them, and they had had to pay rent for both sets of premises.

On the 1st day of February, 1867, the plaintiffs' solicitors served a notice on the defendants' solicitors that the plaintiffs had taken fresh premises, and claiming 9500*l.* as compensation for the loss and expenses to which they had been put, and requiring the company forthwith to serve a formal notice to treat for the purchase of the plaintiffs' interest, and to take all proper steps to have the compensation payable to the plaintiffs properly assessed.

On the 27th day of May, 1867, the plaintiffs served on the defendants a notice stating the particulars of their estate and interests in the lands, and the claims made by them in respect thereof, and that they desired that the amount of compensation payable to them for their interest in the lands, and for the damage sustained by them by reason of the execution of the company's works, should be assessed by a jury, and not by arbitration, and requiring them to issue their warrant to the sheriff to assess the compensation, and to do all things required by law in that behalf.

The defendants had not at the commencement of the action given to the plaintiffs any further notice, or taken further steps for obtaining possession of the lands and premises, or settling the amount of compensation to be paid to the plaintiffs, or issued their warrant to the sheriff for that purpose, contending that they are not bound by their notice to take any such steps, and it was admitted, for the purposes of the case, that they had been required, and refused to take any of the above steps.

The indorsement on the writ formed part of the case, and the following is a copy of such indorsement:—"Take notice, that the plaintiffs intend to claim a peremptory mandamus herein, to command the defendants to issue their warrant to the sheriff, or other proper officer, to assess the amount of compensation payable to the plaintiffs in respect of premises required by the defendants for the purposes of their special act, and which they have notified to the plaintiffs, in pursuance of the statutes in that behalf, that they so required, and intended to enter on and take, and that the plaintiffs also intend, in another count of their declaration, to claim a peremptory writ of mandamus, to command the defendants to serve on the plaintiffs

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a formal notice, satisfying the requirements of the 18th section of the Lands Clauses Consolidation Act, 1845, of their intention to take the said premises above-mentioned. And in a third count, a like writ to command the defendants to give all notices, and do all things by law requisite to be given or done by them for the purpose of enabling the plaintiffs to settle, and of settling, the amount of compensation to be paid by the defendants to the plaintiffs in respect of the said premises. And take further notice, that the plaintiffs also claim damages sustained by them by reason of the breaches of duty of the defendants, and that in default of the defendants entering an appearance as within commanded the plaintiffs may, besides proceeding to judgment and execution for damages and costs, apply for and obtain such writs."

The action was commenced on the 14th day of June, 1867.

The Court were to have power to draw all inferences of facts which a jury might properly have drawn from the above statements.

The questions for the opinion of the Court were:—

1. Whether, under the circumstances stated in the case, an action of mandamus was maintainable to compel the defendants to issue their warrant to the sheriff as required by the said notice of the 27th day of May, 1867.

2. Whether, if such action were not maintainable, an action of mandamus was maintainable to compel the defendants to give to the plaintiffs a formal notice to treat under the 18th section of the Lands Clauses Consolidation Act, or to do any other act for the purpose of settling the amount of compensation to be paid to the plaintiffs in respect of the said lands and premises.

3. Whether, if the Court should answer either of the above questions in the affirmative, the plaintiffs were, under the circumstances, entitled to more than nominal damages.

Sir G. Honyman, Q.C. (*W. G. Harrison* with him), for the plaintiffs. There can be no doubt that an action of mandamus will lie if there is really an obligation on the company to proceed with the purchase of the land: *Fotherby* v. *Metropolitan Railway Company* (1): and it has been decided that there is such an obligation

(1) Law Rep. 2 C. P. 188. 12 Jur. N.S. 1005.

where a notice has been given under the 18th section of the Lands Clauses Consolidation Act. It is well settled that though the powers to take lands contained in a company's special act do not render it obligatory on them to take them, yet, as soon as the company has exercised its option by giving a notice to treat, the parties are substantially in the same position as if there was a contract between them: *Rex* v. *Hungerford Market Company* (1); *Reg.* v. *Birmingham and Oxford Junction Railway Company* (2); *Reg.* v. *Commissioners of Woods and Forests* (3); *Lord Salisbury* v. *Great Northern Railway Company.* (4) The same principle will apply to the notice given under the 13th section of this special act. It is, in fact, an exercise by the company of their option to purchase.

[BOVILL, C.J. Is there any reason why the same notice should not satisfy both sections? Is not the present notice a sufficient compliance with the 18th section of the Lands Clauses Consolidation Act (5) to bind the company?]

[He was stopped by the Court.]

Keane, Q.C. (*Horace Lloyd, Q.C.*, with him), for the defendants. The notice required by the special act refers only to the possession of the premises, and is wholly distinct from the notice to treat under the 18th section of the Lands Clauses Consolidation Act, which is a necessary preliminary to the right to the purchase of the land. Until that has been given the company is not in a position to give the notice required by their special act, and the notice actually given was therefore too soon and invalid. Moreover, a notice to treat under the Lands Clauses Consolidation Act must be given

(1) 4 B. & Ad. 327.

(2) 15 Q. B. 634; 19 L. J. (Q.B.) 453.

(3) 15 Q. B. 761; 19 L. J. (Q.B.) 497.

(4) 17 Q. B. 840; 21 L. J. (Q.B.) 185.

(5) 8 & 9 Vict. c. 18, s. 18:— "When the promoters of the undertaking shall require to purchase or take any of the lands which by this or the special act, or any act incorporated therewith, they are authorized to purchase or take, they shall give notice thereof to all the parties interested in such lands, or to the parties enabled by this act to sell and convey or release the same, or such of the said parties as shall, after diligent inquiry, be known to the promoters of the undertaking, and by such notice shall demand from such parties the particulars of their estate and interest in such lands, and of the claims made by them in respect thereof, and every such notice shall state the particulars of the lands so required, and that the promoters of the undertaking are willing to treat for the purchase thereof, and as to the compensation to be made to all parties for the damage that may be sustained by them by reason of the execution of the works."

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to all the persons interested in the premises. It was not intended to give the company the power of buying up the interests of particular persons without purchasing the whole right of property.

[BOVILL, C.J. The universal practice hitherto has been to treat the interests of different persons as wholly distinct.]

The plaintiffs should not have acted on this notice till they had received also a proper notice under the general act, as they knew that the company could not take the house till they had given them such a notice. With respect to the damages, in any case they should be only nominal. The plaintiffs retain possession of the property, which it may be presumed is as valuable as what they would receive for it from the company.

[WILLES, J. They cannot use it, because they are expecting the company to take it.]

BOVILL, C.J. I think the 13th section of the defendant's special act (27 & 28 Vict. c. cccxv.), is a most useful provision for preventing the injustice that might otherwise occur from occupiers receiving very short notice from the defendants of their intention to take their houses, and it was intended to secure for such occupiers six months' notice before they could be turned out. Similar provisions were introduced into the special acts of other railways in the Metropolis which were passed that year. Independently of this section, the Lands Clauses Consolidation Act (8 & 9 Vict. c. 18), by s. 18, required the promoters of the undertaking to give notice of their intention to take lands to all parties interested in them; and other sections of the same act, as for instance, ss. 21, 38, 41, and 84, provided restrictions for the protection of the occupiers, and rendered it necessary that some time should elapse before the land was taken possession of by the company. They, however, proved insufficient, and the additional clause now under consideration was introduced. It is therefore something superadded to the 18th section of the Lands Clauses Consolidation Act, but I see nothing to prevent the company giving one notice which shall satisfy both sections. It has been expressly decided that a notice to treat under the latter section binds the company, and entitles the person receiving it to compel the company to proceed with the purchase of his interest; and the question therefore arises

whether the notice given in this case is sufficient to satisfy that section, although it does not contain the particulars required by it. It is a notice of the intention of the company to take the lands, and satisfies, therefore, the first part of the section, and is, I think, sufficient to bind them. The object of the latter part of the section is to prepare for the assessment of compensation, if necessary, as appears from the 21st section. (1) It has been contended that the notice required by the 18th section of the Lands Clauses Consolidation Act should be given to all the parties interested in the property, and is of no force if it is not. This, however, is contrary to the universal practice from the passing of that act, and even before, and I should be sorry to throw the slightest doubt upon the doctrine that, if the company has given a notice to treat to any one person, they are bound to purchase his interest, though they may have given no notices to the other persons interested in the premises. The effect of the section, therefore, is, that if the company give a notice of their intention to take land they are compellable to take it, and cannot avail themselves of the fact that they have omitted to include in the notice the particulars required by the section to get rid of their agreement; while, on the other hand, they cannot proceed to have its value assessed adversely unless the notice contained those particulars. Any other interpretation would render this clause of the special act nugatory, or, indeed, an additional source of injustice, of which the present case is an instance. If the plaintiffs had not received the notice they would have remained in their original premises; but on receiving it they removed into fresh premises, acting upon the notice, and thus have two houses upon their hands. In this case the plaintiffs have treated the notice as sufficient, and called on the defendants to issue a warrant to the sheriff for the purpose of having the

(1) 8 & 9 Vict. c. 18, s. 21:—"If for twenty-one days after the service of such notice any such party shall fail to state the particulars of his claim in respect of any such land, or to treat with the promoters of the undertaking in respect thereof, or if such party and the promoters of the undertaking shall not agree as to the amount of the compensation to be paid by the promoters of the undertaking for the interest in such lands belonging to such party, or which he is by this or the special act enabled to sell, or for any damage that may be sustained by him by reason of the execution of the works, the amount of such compensation shall be settled in the manner hereinafter provided for settling cases of disputed compensation."

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value of the premises assessed, and stated the particulars of their interest in them, they have thus supplied the want of particulars in the notice, and the defendants, though they could not have proceeded adversely, may proceed at once to have the compensation assessed, and the plaintiffs are entitled to a mandamus to compel them to do so. The first question therefore must be answered in the affirmative.

With respect to the second question, I should think that even if the notice which has been given is not a sufficient compliance with the 18th section of the Lands Clauses Consolidation Act, it would entitle the plaintiffs to insist upon having such a notice; it is, however, unnecessary to decide this in the view I take of the first question.

As respects the third question, the plaintiffs have actually gone out of possession of the premises proposed to be taken by the company, and have therefore to pay double rent for no purpose. It seems to me impossible to say that under no circumstances could the plaintiffs be entitled to more than nominal damages. That question therefore must also be answered in the affirmative.

WILLES, J. I am of the same opinion. I observe the terms of the mandamus prayed for in the third count are well framed to obviate all difficulty as to whether the right of the plaintiffs is to have the precept to the sheriff issued at once, or only to have a notice to treat under the 18th section of the Lands Clauses Consolidation Act, which would, in its turn, entitle them to have the precept issued. The true question, therefore, is whether or not the notice of the company means that they have a fixed intention to take the land by which both parties are bound; and I cannot help thinking that is its true construction. It cannot have been the intention of the legislature that the company should be able to go back from their notice when once given. The term of six months was probably fixed upon with reference to the length of an ordinary notice to quit, and it was intended that the notice under the statute should be equally binding. Otherwise the occupier would only be saved from the inconvenience of being turned out of his premises without notice, at the risk of having two houses upon his hands for so long as the company should choose to delay their proceedings.

With respect to the question which has been raised by Mr. Keane, whether the company are bound by their notice to a person having a partial interest in the land, unless they have also given notice to all other persons possessing an interest, I own I cannot appreciate it, because it is impossible that the proceedings for the purchase of the interests of different persons in the land should proceed pari passu, and conveyances of their interests must be often obtained from some and not others. I think that to require the whole, if any, of the interests in the land to be purchased is too impracticable for us to suppose that the legislature can have meant to enact it, and I do not see that it flows from the language that has been used.

MONTAGUE SMITH, J. I am of the same opinion. I think the 13th section of the special act superadds to the 18th section of the Lands Clauses Consolidation Act an obligation that, in the case of an occupied tenement, the notice shall be given six months before it is intended to operate. The company are to give notice of their intention not only to enter upon, but to take the lands; and it is a notice therefore of a similar character to that under the 18th section of the general Act. The company might, I think, give either one notice or two; but even in the latter case they would be bound by such a notice as that now given. The plaintiffs have acted on the notice and changed their position, and it was intended they should do so. I think the case comes entirely within the principle of the cases referred to with reference to the earlier section.

With respect to the third question, it seems to me that it was decided in *Fotherby* v. *Metropolitan Railway Company* (1), that the plaintiff in cases of this nature may be entitled to more than nominal damages. Erle, C.J., there says, at the close of his judgment:—"There is therefore in this case a substantive cause of action for damages, if that were really necessary." Here the plaintiffs have clearly sustained actual damage.

Judgment for the plaintiffs.

Attorneys for plaintiffs: *Wright & Bonner.*
Attorney for defendants: *Burchells.*

(1) Law Rep. 2 C. P. at p. 194.

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June 3.

POTTER *v.* RANKIN.

Marine Insurance—Policy on Freight—Notice of Abandonment.

The plaintiff, owner of a vessel chartered to sail from Glasgow to New Zealand with cargo and there discharge, thence to proceed to Calcutta and load cargo and therewith proceed to London, effected a policy on the chartered freight from Calcutta to London, to attach only during the preliminary voyage to New Zealand. The vessel received injuries on its voyage to New Zealand, which would have justified abandonment or sale, but neither took place within a reasonable time, and the plaintiff partially repaired the vessel at New Zealand, and sailed it to Calcutta. No notice of abandonment of the freight was given within a reasonable time:—

Held, that there was neither an actual nor a constructive total loss of the freight.

THIS was an action by a mortgagee in possession of the ship *Sir William Eyre* against an underwriter upon freight to recover as for a total loss.

The cause was tried before Bovill, C.J., at the sittings in London after last Michaelmas Term, when a verdict was entered for the defendant, with leave to move to enter it for the plaintiff.

Sir G. Honyman, Q.C., having obtained a rule accordingly,

Mellish, Q.C., Watkin Williams, and *Cohen*, shewed cause, and cited *Cambridge* v. *Anderton* (1), *Roux* v. *Salvador* (2), and *Knight* v. *Faith* (3), to shew that the object of a notice of abandonment is to mark the election of the assured: *Barclay* v. *Stirling* (4), *Scottish Marine Insurance Company* v. *Turner* (5), *M'Carthy* v. *Abel* (6), Benecke's Principles of Insurance, pp. 411, 412, Arnould on Insurance, p. 989, to shew that the underwriter on freight is interested in the election of the assured: and *Fleming* v. *Smith* (7), to shew that the conduct of the plaintiff amounted to an election not to treat it as a total loss.

Sir G. Honyman, Q.C., Hannen, and *Lanyon*, in support of the rule, cited *Moss* v. *Smith* (8), *Mount* v. *Harrison* (9), and Phillips on Insurance, s. 150.

(1) 2 B. & C. 691.
(2) 3 Bing. N. C. 266, 282.
(3) 15 Q. B. 649; 19 L. J. (Q.B.) 509.
(4) 5 M. & S. 6.
(5) 1 Macq. H. L. C. 334.
(6) 5 East, 388.
(7) 1 H. L. C. 513.
(8) 9 C. B. 94; 19 L. J. (C.P.) 225.
(9) 4 Bing. 388.

The facts of the case and the arguments appear fully from the judgment of the Court.

Cur. adv. vult.

June 3. The judgment of the Court (Bovill, C.J., Willes, J., Keating, J., and Montague Smith, J.) was delivered by

WILLES, J. This was a question reserved upon the trial before the Lord Chief-Justice, when the verdict passed for the defendant, subject to leave to move to enter it for the plaintiff, the Court being by consent in the place of the jury, and having power to decide both law and fact.

The action was brought by a mortgagee in possession of the ship *Sir William Eyre*, against an underwriter upon freight, to recover a total loss of freight expected to be earned under a charterparty with one De Mattos, dated the 9th of February, 1863, of the ship, described as then on a voyage to New Zealand, and whereby it was agreed that she was to "sail to New Zealand with cargo for owners benefit, and, having discharged, and being made tight, staunch, and strong, and every way fitted for the voyage, should sail and proceed to Calcutta, and there, being tight, staunch, and strong, and every way fitted for the voyage, should load from the freighters a full and complete cargo of legal merchandize" in certain agreed proportions, and therewith should proceed to London, &c.

The policy was effected two days after. It applied only to the chartered freight from Calcutta home, and attached and was to continue only during the preliminary voyage to New Zealand; for, it described the amount and interest assured as "4000*l.* on homeward chartered freight," and the voyage insured as being from "the Clyde to Southland (N. Z.), while there, and thence to Otago, New Zealand, and for thirty days in port there after arrival."

The ship was on her voyage from Glasgow to New Zealand with passengers and cargo at the respective dates of the charterparty and policy.

On the 23rd of April, 1863, she arrived at Bluff Harbour, Southland. Whilst there she took the ground, and with great difficulty was got off and floated on the 22nd of May. On the 27th of May she was surveyed; but the surveyors were not able to ascertain the

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amount of damage, there being no dry dock or patent slip; and there was none in New Zealand, or nearer than Sydney. On the 29th of May, a violent gale came on, and the vessel again grounded fore and aft, and so remained until the 6th of June, when she was again afloat, but before she could be brought up in the channel she grounded again, and was not finally got off until the 1st of July, when she left for Dunedin. The extent of damage at Bluff Harbour could not be ascertained without examining the vessel in a dry dock or patent slip. On the 4th of July, 1863, she arrived at Port Chalmers, the port of Dunedin, and there remained until the 14th of April, 1864. At that port surveys were held; and it may be taken as the result of those surveys, and of the information communicated to the owners whilst the vessel was at Port Chalmers, that the vessel had suffered much damage, which could not be estimated at the place, and did not prevent her from being repaired sufficiently to proceed to Calcutta, but rendered it proper that her bottom should be thoroughly examined at the first convenient port, to ascertain the real extent of the damage. The information was enough to put the assured upon inquiry, and make it incumbent upon him, if abandonment were necessary to make a total loss, not to delay the examination indefinitely; and, consequently, if he meant to put off abandoning until the actual state of damage was found sufficient to justify that course, he was bound according to the principle acted upon by this Court in the case of *Potter* v. *Campbell*, where the assurance was upon the same ship, to act with reasonable diligence in procuring the final survey.

The vessel during her stay at Port Chalmers was employed for storing coals, for which the master received as rent about 800*l*. She sustained damage whilst lying at Port Chalmers, and after the risk had expired; but not such as materially to affect her condition.

The vessel, but for want of funds, might have sailed from Port Chalmers in August, or at latest September, 1863; and the delay for some seven months after that time was caused by want of funds, which the owners' agents refused to advance. A large part of the delay was traceable to causes for which the owner and master were answerable, and not to sea-perils; and, but for the operation of such causes, the delay would probably not have taken

place. Great and substantial delay is therefore attributable to the assured, in keeping the vessel at Port Chalmers.

The nearest port at which the vessel could have been dry-docked so as to be thoroughly examined or repaired, was Port Sydney, which is distant from Port Chalmers eight or nine days' sail only, and the voyage to which is not only shorter, but is attended with less risk than that to Calcutta. The master did not, however, consider the propriety of taking the vessel there to repair, instead of to Calcutta; and it was a prudent and proper course, under the circumstances, to go to the latter port with a view to earning the chartered freight, if possible and advisable. It must not be assumed that it would have been otherwise than prudent and proper to proceed with diligence to Port Sydney, there to have the bottom examined, and finally determine whether to abandon the adventure or not.

If that course had been taken, and it had been found that repair would have been ruinous, and thereupon the ship had been within a reasonable time sold or abandoned, then the adventure in which the freight was to be earned would have been at an end by reason of the consequences of the peril insured against; and the question whether abandonment of the freight was also necessary would have arisen in a materially different form. As it was, the vessel, being repaired as far as was necessary for the more distant and perilous voyage to Calcutta, went there instead of to Port Sydney, with a view doubtless to earn the freight thence home, and she was treated and used by the owner as a ship capable of earning freight up to the time of and after her arrival at Calcutta. Had she proceeded thither with reasonable diligence, that might have raised a question of fact whether there was such a material difference between going to Sydney and going to Calcutta, as that the choice of the latter instead of the former constituted such an unreasonable delay on the part of the owner as to make the ship his, and to constitute an election to treat the loss as partial.

On the 14th of April, 1864, the vessel, having undergone the necessary repairs for the voyage to Calcutta, left Port Chalmers, and on the 7th of June, 1864, arrived at Calcutta without casualty. At this time she was not covered by the policy now sued upon; but her condition upon her arrival there was in substance the same

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as when she was surveyed at Port Chalmers. At Calcutta she was dry-docked and surveyed, and it was ascertained that the cost of the repairs rendered necessary by the injuries she had received at Bluff Harbour in order to render her sea-worthy, would exceed the value of the ship when repaired, assuming the ship to have been repaired at Calcutta. It did not appear that she could have been more cheaply repaired elsewhere.

Upon receiving intelligence of that survey, and not before, viz., upon the 2nd of August, 1864, the assured gave notice of abandonment of the ship (which was insured by a separate policy) to the underwriter on ship, and gave the defendant notice of abandonment of the freight.

Up to the time of these notices of abandonment the vessel had been commanded and sailed by the master of the assured, acting for him, and without any act done other than was consistent with the intention of treating her as an existing ship, and the property of the assured. The master regularly corresponded with his owners, kept them aware of the facts, and, except so far as he was guilty of breaches of the Merchant Shipping Act, conducted himself in an apparently proper and prudent manner in the interest of his owners, and with their authority.

The ship whilst lying at Calcutta became a total wreck, in the cyclone of the 5th of October, 1864, being then insured as a ship by a time policy effected upon the 16th of July, 1864, upon which a total loss was afterwards recovered: see *Barker* v. *Janson*. (1)

On the 8th of December, 1863, De Mattos stopped payment; and his agents would not have shipped a cargo for his account after the month of December.

Assuming upon the state of facts (without staying to inquire whether the charter freight, or any part of it, ought to be added to the value of the ship when repaired), that the ship was so damaged during the risk insured that she could not be prudently repaired, and concluding, according to the decision of this Court in *Potter* v. *Campbell*, that, if abandonment was necessary, it was too late, the question then arises for decision, whether damage to the vessel which might have justified an abandonment or sale, not followed by either within a reasonable time, and notwithstanding that the

(1) Law Rep. 3 C. P. 303.

assured after the damage and the expiration of the risk retained, partially repaired, and sailed the vessel on a long voyage under his control, constituted from the time when such damage occurred an actual total loss of the prospective charter freight.

In deciding this question, there must first be considered the subject-matter of the insurance, to determine for what and to what extent the underwriters were to be answerable.

The case of insurance of specific chartered freight to be earned upon a future voyage against perils to be incurred in the current one, is, so far as we can learn, exceptional in practice, though not unprecedented. An ordinary insurance upon freight is a contract of indemnity, during the adventure in which the freight is to be earned, against perils affecting either the cargo or the ship, by the operation of which there may be either no cargo or less cargo left to be carried or no ship to carry it to its destination; or the freight may be saddled with general average contribution in respect of ship or cargo: and to this contract of indemnity the suing and labouring clause superadds a contract for reimbursement of extraordinary expenses necessarily incurred in order to prevent a loss of the freight, for which the underwriters would be liable; which reimbursement does not include repairs of damage to the ship; underwriters on freight not being answerable for, nor, except in case of general average, bound to contribute to such repairs.

The policy under consideration thus differs from an ordinary insurance upon freight,—first, in that it could not be affected by loss of cargo, because the freight insured was not for cargo in existence or appropriated during the risk,—next, that it was not subject to general average either of ship or cargo, because the freight was not to be earned during the voyage insured, and, as a consequence, that the underwriter was not in any case to contribute to repairs of the ship, not even in respect of general average,—and lastly, that, as the freight rested in contract for the future employment of the ship only, it would not pass by bare abandonment to the underwriters upon ship, but would simply come to nothing upon such abandonment, if justifiable; because the abandonment would in effect be an election by the owner to treat the charter as at an end by reason of the usual exception of sea perils in the charter; and he would not be bound to incur, in favour of the underwriter

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on ship, any new responsibility not connected with the voyage for which the ship was insured.

The realization of the freight thus insured was contingent upon, first, the performance of the preliminary voyage to New Zealand; secondly, the like of the voyage thence to Calcutta; third, the fulfilment of the charterparty there; and fourth, the performance of the return voyage to England. All the trouble, expense, and risk of the adventure, as between the underwriter and the assured, with the exception of the total loss of the ship during the voyage to New Zealand, were to be incurred by the assured. In the case of partial loss or damage to the ship, no liability would have been incurred by the underwriters. In such an event, the assured might repair and earn the freight; and, if he declined to do so, he would lose it by his own choice or default, and not by any peril insured against. The policy in this case was in its nature, therefore, against total loss of freight by total loss of the ship.

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The insurance of a subject thus dependent upon the possession of the ship, though not properly an accessory thereto, nor incident to the voyage insured, yet, being insured by the ordinary form of policy, ought to be dealt with upon the same principles as an insurance of the ship itself, and as subject to the same conditions in respect of abandonment and otherwise, unless so far as the character of the subject-matter rendered abandonment idle or inapplicable.

One test which may be applied is, to consider the time at which the alleged total loss, if any, arose. At what time was the total loss, if any, of the insured freight consummated? and when did the liability of the underwriters to pay for that loss accrue? The assured must answer that the total loss was complete, actual, and absolute, without abandonment, at Bluff Harbour, immediately upon the happening of the damage, to repair which would cost more than the value of the vessel; and, if that were so, the subsequent proceedings of the owner were immaterial, inasmuch as no freight, properly so called, was in fact subsequently earned. Before adopting this conclusion, however, there must be considered the condition of the owner and underwriter in the class of cases which such a decision would govern; and, in doing this, there must be kept steadily in sight the facts that, putting out of consideration the

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tardy abandonment of the 2nd of August, 1864, the owner retained the control of the vessel, under the command of the master acting for him, during the unreasonable delay at Port Chalmers, during the repairs for the voyage to Calcutta, and until her final destruction in the cyclone of the 5th of October, 1864; and that, as appears by the correspondence, he did not relinquish the intention of sailing her as a ship, and earning freight from Calcutta home until after the result of the surveys at Calcutta was known; and that was more than a year after the damage alleged to have caused an actual total loss; though, with respect to the charter freight, he probably knew or feared that it had become hopeless, or at least doubtful, by the insolvency of De Mattos, against which he was not insured, and the occurrence of which insolvency, however it might have operated upon the amount of damages, could not affect the question of liability.

An owner thus retaining the vessel might, as between him and the charterer, elect either to abandon the adventure (on account of the repair of the damage exceeding the value of the vessel) or to prosecute it, and with the latter view proceed to the chartered port of loading, repairing the vessel either there or on the way. He was not bound, as between him and the charterer, to continue the adventure, because he might have excused himself under the ordinary exception of sea perils in the charterparty; but he was entitled to repair, and earn the freight, if he thought proper; and circumstances might occur to send ships up in the market, and make it the interest of a ship-owner in like case to repair, and an imprudence not to repair. If in this case the assured had chosen to repair either at Sydney or at Calcutta, he would have been in a condition to earn the freight, and might but for De Mattos's insolvency have in fact earned it; and so no actual absolute loss of the freight by perils insured against did in fact take place. If this were a remote possibility, a mere improbable speculation, out of ordinary experience in like cases, it ought to be rejected as of no weight in deciding a practical question. Far, however, from the earning of the freight being desperate in this particular instance, the owner continued to prosecute the adventure and treat the vessel as his own, without abandoning either ship or freight; and, if experience in like cases is to be consulted, it is notorious that

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vessels which might have been abandoned because of the cost of repairs, have occasionally, whether prudently or not, been repaired by the master, and have earned freight, whereby the underwriter upon ship has become answerable only for a partial loss, and the underwriter upon freight has been relieved from liability. Indeed, cases have even occurred in which the underwriter on freight, having upon abandonment paid a total loss in the first instance, has, upon the voyage being in the event completed, recovered from the assured the freight ultimately earned, as upon an equitable assignment of possible freight, with an undertaking to pay it over if forthcoming. And the instances in which vessels justifiably sold under circumstances of distress have been repaired by purchasers who, from being on the spot, had greater advantages than the sellers, so as to earn or be capable of earning freight, are numerous.

In the former class of cases, that of repairs by the master and prosecution of the voyage, there is no abandonment of the adventure; freight is earned, though at an expense not originally contemplated; and the underwriters cannot be debited, as of the time of the damage to the vessel, with an actual total loss, though it should turn out that she was so injured as not to be worth repairing.

In the latter class of cases, that of justifiable sale by the master before any freight is earned, such a sale in consequence of damage by the perils insured against deprives the assured owner of all control over the ship, and, presumably, of all capacity of earning freight. Accordingly, if such a sale takes place before any freight is earned, and before a reasonable time for abandonment has gone by, it supplies the place of an abandonment to the underwriter; because, by an event for which he was not to blame, the assured has abandoned the adventure and lost all control over it, and therewith all interest, existing or contingent, of which he could divest himself by abandonment in favour of the underwriter.

The case of justifiable abandonment of the ship to the underwriters on ship, before any freight is earned, might be put upon the same footing as a justifiable sale through necessity; not that the fact of the ship being insured can have any direct effect upon the liability of the underwriters on freight by a separate contract,

but because abandonment to underwriters on ship is one of the known incidents of maritime commerce by which the ship, upon which the freight depends, may, by the proximate though not necessary effect of the perils insured against, become lost to the assured, and the adventure be brought to an end as completely as if the vessel had been sold or actually lost. And this suggests another case in which abandonment might become unnecessary, viz. the actual total loss of the ship, though by a peril not insured against, before a reasonable time for abandonment had gone by. In these cases, if the loss be total without abandonment, it must be upon the ground that, by reason of an event, for which the assured was not to blame, happening after the damage in respect of which he might if he chose have claimed a total loss upon abandonment, all choice by the assured is out of the question, and accident has elected for him that he should not retain the vessel, or what remains or can be made of her.

Cases have occurred, upon ordinary policies upon freight, in which, notwithstanding the total loss of the vessel, actual or constructive, the freight has yet been earned. In such cases, if it be earned whilst the vessel is under the control of the owner, the underwriter upon freight is discharged. Where the freight is earned after the owner has ceased to have the control of the vessel, and she has been abandoned to the insurer upon ship, it has been thought questionable how far the underwriter on freight is liable; and it may be open to consider whether the freight ultimately earned, though not for the owner, is to be considered as earned in the adventure assured and over which he had control, or in a new adventure after his control has ceased. Considerations of that kind, however, are in this case unnecessary, not only because in fact no freight was earned, but also because, for the reason already given, abandonment of the ship would not have carried the right to the freight in question.

The analogy chiefly discussed in argument was that of damage to a ship, great enough to justify abandonment, but not to destroy the specific character of the ship, and therefore not causing an actual total loss. In such a case, unless the damage be followed by abandonment, or by sale, destruction, or other termination of the adventure, within a reasonable time for abandonment, there is

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no total loss of the ship; and, consequently, if the insurance be against total loss only, the underwriters upon ship are altogether absolved from liability. And the same result would follow in case of constructive total loss of the cargo.

In either of these cases, and especially in that of ship (because in the principal case, as already explained, the insurance dealt with perils to ship only,) is the assured entitled to recover as upon an actual total loss of freight, although there may be no total loss of the subject-matter to which freight was accessory or dependent? The affirmative of this proposition is necessarily contended for by the assured, upon the ground that, in the case of freight, abandonment is inoperative, and may be dispensed with, and that, to view the exertions of the ship-owner to earn the freight instead of abandoning or selling, as being prejudicial to his right, although required by a technical rule in case of ship, would be, so far as freight is concerned, a discouragement to exertion, and a premium upon reckless sacrifice of property, which, in the majority of cases, would redound to the disadvantage of underwriters. On the part of the underwriters, it may be answered that abandonment of freight has in practice been made where the earning of freight has been only more or less imperilled, and not made actually hopeless; that the insurance of freight, except where it has been paid beforehand, is not of an existing thing, like ship or goods, but only of the chance of safe carriage and a payment in futuro, subject to contingencies which depend to some extent upon the exertions of the assured, and upon the exertions and good faith of strangers for whom the underwriters are not responsible, and, as to the rest, upon safety from the perils insured against; that, where the effect of those perils is to make the earning of freight impossible, there is an actual total loss, and no question of abandonment can arise; that, where the effect of the perils is only to make the earning of freight improbable, by superadding to the inseparable contingencies the improbability of damage being improvidently repaired, that there is still a chance of the ship being repaired, and of the freight being earned; that, in this case, that chance is proved, not only by experience of like cases, but by the conduct of the assured, to have been of some value, and the earning of freight not to have been hopeless by reason of the damage; that, although true it is,

as events turned out, the underwriters could have obtained no benefit from the abandonment, yet, if the adventure had been continued, and freight had actually been earned under the charter-party, the underwriters paying a total loss under an abandonment would have come in with a preferential title as equitable assignees of the freight earned, and not merely in concurrence with other creditors with a claim not preferential to the return of money paid upon a consideration which had failed; that, therefore, the general rule of insurance law applies, that, where the thing insured subsists in specie (and here the thing insured, viz., the chance of earning the freight, did survive the risk), and can be restored, though at an improvident expense, in order to make a total loss, there must be an abandonment; and that, as for the impolicy of checking subsequent exertions to earn the freight, so long as those exertions are made in good faith, with a view to do the best for all concerned, they cannot affect the interest of the underwriters on freight, or operate as a waiver of the notice of abandonment.

This view appears the most in accordance with usage and convenience. It secures to the underwriter timely notice of the claims to be made upon him, and the opportunity of speedy and thorough inquiry to protect him from being made liable for subsequent damage not covered by his policy,—objects which alone would not justify holding abandonment necessary, but which justify upholding its necessity, where, upon any reasonable construction, it can be operative. And, on the other hand, it does not interfere with the honest exertions of the assured to prosecute the adventure with success.

It was plausibly suggested that all the advantages of abandonment would be obtained by means of subrogation; but this would make abandonment unnecessary in many cases in which it has hitherto been considered essential; and subrogation is properly applicable to remedies which the assured has against wrong-doers, rather than to the recovery of the thing insured itself.

To this must be added, that the argument which goes to exclude abandonment, proceeds not so much upon the ground that the thing insured is destroyed rather than imperilled, as upon the notion that it becomes so little worth pursuing as not to be worth abandoning. But, if this were so, it must be because the ship was

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so little worth repairing as not to be worth abandoning as a ship; yet, undoubtedly, a timely abandonment was necessary in order to make a total loss of ship. So that, in order to avoid inconsistency and anomaly, either the doctrine of constructive total loss by damage to ship making repair improvident must be extended to freight, with all its conditions, including that of abandonment, when the earning of freight remains within the control of the assured, by reason of the ship being neither actually lost, sold, or abandoned, or it ought to be held that there is no total loss of freight by damage to ship in a case like the present, where the ship remains in specie under the control of the assured, neither sold nor abandoned; or, in other words, as already indicated, that the true character of the insurance in question, was against total loss of freight by total loss of ship, actual or constructive.

From that dilemma the claim of the assured in this case cannot, as it should seem, be extricated. The verdict for the underwriters was therefore right, and the rule to set it aside will be discharged.

Rule discharged.

Attorneys for plaintiff: *Thomas & Hollams.*
Attorneys for defendant: *Field & Roscoe.*

[IN THE EXCHEQUER CHAMBER.]

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June 19.

MILLS *v.* THE MAYOR, &c., OF COLCHESTER.

Prescription—Reasonableness of Fee—Oyster Fishery—Licence to Dredge.

The mere circumstance of the owners of an oyster-fishery having for a period of one hundred and fifty years received a fee of 2*l.* 2*s.* for a licence for four dredges, will not, in the absence of all evidence on the subject, warrant the assumption that 3*l.* 3*s.* is an unreasonable sum to demand for such a licence.

ERROR upon a decision of the Court of Common Pleas in favour of the defendants upon a special case. (1) The main point to be determined was whether the plaintiff was entitled to dredge and take oysters in a fishery belonging to the corporation of Colchester, on payment of "the usual and accustomed payments and fees," and to have a licence granted to him for that purpose. The contention on the part of the plaintiff was, that the facts set out in the special case shewed that there was an immemorial custom within the borough of Colchester and certain parishes adjoining the river Colne, for the defendants and their predecessors to hold courts and grant licences to persons who had served seven years' apprenticeship to a licensed dredgerman resident in any one of certain parishes, to dredge for and take oysters under regulations from time to time made by the dredgermen and confirmed by the defendants and their predecessors, upon payment of a reasonable fee, viz. a fee of 10*s.* 6*d.* for a licence for each dredge, not exceeding four dredges to one person. Such licences had in fact been so granted by the defendants for this fee for about 150 years; but the defendants contended that the evidence did not establish any valid custom to this effect.

The plaintiff was a licensed dredgerman resident in one of the parishes, and was admitted, according to the practice stated in the case, at an Admiralty Court, having been duly apprenticed and served his apprenticeship, and he duly applied for a licence for four dredges, and tendered 2*l.* 2*s.* in payment for the licence, but the defendants refused to grant the plaintiff the licence unless he paid a fee of 3*l.* 3*s.* for the same; at this court 376 dredgermen

(1) Law Rep. 2 C. P. 476.

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received licences to dredge with four dredges, on payment of a fee of 2*l.* 2*s.*; before granting licences at a fee of 2*l.* 2*s.* each to these 376 dredgermen, the assembled body of dredgermen were informed by the mayor that at a meeting previously held the same day the town-council had resolved to refuse licences to six dredgermen, except at a fee of 3*l.* 3*s.*, for the purpose of raising the question raised in this case; and that the plaintiff was one of the dredgermen of whom under this resolution a fee of 3*l.* 3*s.* was demanded.

The question was whether the plaintiff was entitled to have granted to him a licence to dredge and take oysters in the fishery upon payment of 2*l.* 2*s.*

June 17, 18, and 19. *J. Brown, Q.C.* (*Pollock, Q.C.*, with him), for the plaintiff, and *Denman, Q.C.* (*R. E. Turner* and *Philbrick* with him), for the defendants. The arguments were substantially the same as were urged in the Court below; and the following authorities were referred to:—

For the plaintiff,—*Shephard* v. *Payne* (1); *Mills* v. *Mayor of Colchester* (2); *Mellor* v. *Spateman* (3); *Rex* v. *Churchill* (4); *Hall* v. *Mayor of Swansea* (5); *White* v. *Coleman* (6); *Beardsworth* v. *Torkington* (7); *Deeble* v. *Linehan* (8); *Eldridge* v. *Knott* (9); *Lyme Regis* v. *Henley* (10); *Jenkins* v. *Harvey* (11); *Bryant* v. *Foot* (12); *Tyson* v. *Smith* (13); *Rogers* v. *Brenton* (14); *Arkwright* v. *Cantrell* (15); Com. Dig. Admiralty; 1 Shep. Touchst. 78, 79; 4 Bythewood and Jarman's Conveyancing, 394; Best on Presumptions, 144, 145; Taylor on Evidence, ss. 114, 114a; Grant on Corporations, 109.

For the defendants,—*Gateward's Case* (16); *Mayor of Colchester* v. *Brooke* (17); *Church* v. *Thame.* (18)

10 Jur. N.S. 570; 9 L.T. 354

(1) 12 C. B. (N.S.) 414; 31 L. J. (C.P.) 297: in error, 16 C. B. (N.S.) 132; 33 L. J. (C.P.) 158.
(2) 17 C. B. (N.S.) 635.
(3) 1 Wms. Saund. 343.
(4) 4 B. & C. 750.
(5) 5 Q. B. 526.
(6) 1 Freem. 134; 3 Keble, 247.
(7) 1 Q. B. 782.
(8) 12 Irish C. L. R. 1.
(9) 1 Cowp. 214.
(10) 3 B. & Ad. 77; 2 Cl. & F. 331.
(11) 2 C. M. & R. 393.
(12) Law Rep. 3 Q. B. 497.
(13) 9 Ad. & E. 406.
(14) 10 Q. B. 26.
(15) 7 Ad. & E. 565.
(16) 6 Co. Rep. 59. b.
(17) 7 Q. B. 339.
(18) Law Rep. 2 C. P. 480, n.

Before the close of the defendants' argument, the Court asked *Brown* how he proposed to deal with the question of the reasonableness of the fee demanded, assuming the plaintiff to be entitled to a licence on proof of his qualification and payment or tender of a reasonable fee; observing that, if three guineas was a reasonable fee for a licence for four dredges, the plaintiff could not maintain the action, inasmuch as there was no evidence that that sum had been tendered.

Brown, Q.C. A fee of 10*s.* 6*d.* per dredge having been demanded and paid for a period of at least one hundred and fifty years, it must be assumed that that fee and no other was a reasonable fee.

[KELLY, C.B. Two guineas, no doubt, would be a *reasonable* fee for four dredges; but the question is whether three guineas was an *unreasonable fee.*]

That which is usual is generally received as the test of reasonableness. The number of dredgers and the revenue derived by the corporation from the fishery appear to have gone on increasing from year to year from 1758 to the present time. The Court may, therefore, well presume from the long usage that the antient fee of 10*s.* 6*d.* per dredge was one which it was reasonable for the dredgers to pay and for the corporation to receive.

KELLY, C.B. The quantity of oysters and the degree of stint must necessarily vary from time to time. This and other considerations may and ought to, and doubtless do, cause the regulations for the management of the fishery to be from time to time altered. In judging of the reasonableness or unreasonableness of the fee demanded by the corporation for licences to dredge, we can only look to the case and the evidence which we find there set out. Having carefully considered it, we are all clearly of opinion that, regard being had to the sum which has been received for these licences during a period of one hundred and fifty years or thereabouts, an advance of 50 per cent. cannot in the present state of the fishery be assumed primâ facie to be unreasonable. The burthen of shewing that it was so lay upon the plaintiff, and he has offered no evidence on the subject. We regret much to be obliged to decide the case upon this narrow ground; but it would be manifestly inconsistent with our duty to hear a long argument upon points

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which appear to us to be immaterial to our judgment. The judgment of the Court of Common Pleas must therefore be affirmed.

BRAMWELL and CHANNELL, BB., BLACKBURN and HANNEN, JJ., concurred.

Judgment affirmed.

Attorneys for plaintiff: *N. C. & C. Milne, for Smithies, Goody, & Son, Colchester.*

Attorneys for defendants: *Kingsford & Dorman, for Turner & Deane, Colchester.*

June 19.

[IN THE EXCHEQUER CHAMBER.]

THE FREE FISHERS OF WHITSTABLE *v.* FOREMAN.

Prescription—Anchorage-due, what will sustain a Claim for—Antient Port.

An oyster-fishery had been possessed and an anchorage-due claimed and received from time immemorial by the lords of the manor of Whitstable in respect of all vessels casting anchor within the limits of certain anchorage-ground within the manor. The anchorage was natural holding-ground, with natural breakwaters. In 1795, the fishery and the soil (including the anchorage-ground) were conveyed by the lord, with all its rights and appurtenances, to the plaintiffs, who thenceforth claimed and received the anchorage-dues. There was some evidence that Whitstable was a limb of the port of Sandwich; but there was no direct evidence to shew that the anchorage-ground was within or connected with the port, or that the franchise of the port was ever granted out by the Crown. There was, however, evidence that the lord of the manor was the owner of a landing-place called Le Craston, within the limits of the manor, but its precise position could not now be ascertained, and that he took toll upon merchandize landed there, and also that he was owner of the anchorage-ground, and took the anchorage-due as such lord and owner of the soil. The recitals in an act of parliament by which the plaintiffs were incorporated and impowered to purchase the manor and manorial rights, stated that there were "customary payments usually and of right made to the lord of the manor for or in respect of any ship or vessel on the landing of goods or merchandize within the said manor." There was also evidence that the plaintiffs had as far back as living memory extended maintained buoys and beacons, which served the double purpose of pointing out the channel by which vessels of small burthen might safely reach the anchorage-ground and also of protecting the oyster-beds.

Held (affirming the judgment of the Court of Common Pleas), by Kelly, C.B., Channell, B., Blackburn and Mellor, JJ., upon a special case reserving power to the Court to draw all inferences of fact, that the maintenance of the buoys and beacons, taken in connection with the ownership of the soil of the anchorage-

ground, and the benefit to the public therefrom, afforded a sufficient consideration to sustain the claim to the anchorage-due.

Held, by Martin and Bramwell, BB., that assuming Whitstable to be an antient port, the facts stated did not justify the inference that there was any consideration to sustain the claim of anchorage.

Aff'd in H. of L. 4 H. L. 266

ERROR from the decision of the Court of Common Pleas in favour of the plaintiffs upon a special case. (1)

Feb. 5. *Denman, Q.C.* (*Mellish, Q.C.*, and *Raymond* with him), for the plaintiffs.

Prentice, Q.C. (*F. M. White* with him), for the defendant.

The arguments and the authorities cited were substantially the same as those in the Court below.

Cur. adv. vult.

June 19. The judgment of the majority of the Court (Kelly, C.B., Channell, B., Blackburn and Mellor, JJ.), was delivered by

KELLY, C.B. This is a special case stated for the purpose of raising the question whether the plaintiffs are entitled to an anchorage-toll of 1*s.* in respect of each vessel anchoring or taking ground below low-water mark in the anchorage-ground at Whitstable. A claim to a similar toll in respect of vessels coming into the railway harbour was abandoned in the court below.

In a former action,—*Gann* v. *Free Fishers of Whitstable* (2),—brought by the now plaintiffs against another person for a similar toll, the ultimate decision of the House of Lords was against the plaintiffs; but that decision was founded on the special circumstances stated in the case, which did not in the opinion of the House of Lords disclose anything more than evidence that the plaintiffs, and those whose estate they had, had from time immemorial taken an anchorage-toll of this amount from all vessels anchoring in the part of the sea in question, and had from time immemorial had a several fishery for oysters at the spot in question, and were owners of the soil of the anchorage-ground. Taking this view of the facts, the decision of the House of Lords was, that, inasmuch as the ownership of the soil in the high seas must be subject to the free enjoyment of the right of navigation, that

(1) Law Rep. 2 C. P. 688. (2) 11 H. L. C. 192; 35 L. J. (C.P.) 29.

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ownership alone could not support a claim to anchorage. Lord Westbury, in delivering his judgment as Lord Chancellor, proceeds to say (1): "If the payment be claimed as an antient anchorage-due, some facts must be shewn which either prove, or from which it can be inferred, that the soil claimed by the respondents was originally within the precincts of a port or harbour, or that some service or aid to navigation was rendered to the public, in respect of which the alleged grant was made; but nothing of the kind appears, *and no such case can be presumed or inferred from the mere fact of an immemorial payment.* No such case is made by the respondents; and the payment is demanded merely on the ground of its having been immemorially made to the lords of the manor of Whitstable and their assigns, in respect of the ownership of the site,—an antient oyster-fishery now vested in the respondents."

The decision of the House, therefore, determines that the ownership of the soil below low-water mark vested in a subject is not by itself such a consideration as would support an express grant by the Crown of an anchorage-due, or would render an immemorial custom to take such a due valid; and it also determines that, though the creation of a port by the Crown on the spot would support a grant by the Crown to the owner of the soil of such a due, and consequently that the immemorial existence of a port on the spot would shew such a possible good legal origin as would support the immemorial custom, yet that the fact of the immemorial taking of the toll, though it would be rightful in its origin if the spot was in a port, and wrongful if it was not in a port, did not *of itself* afford sufficient ground for inferring that the spot was an antient port, or that such special services were rendered, either by express stipulation in some lost grant, or by immemorial usage, as would support such a grant or custom.

This has, no doubt, an important bearing on the present case; and this decision is binding on us, and must not be departed from; but it certainly leaves it open to the plaintiffs to endeavour to supply the deficiency by furnishing in another case sufficient evidence of facts from which it ought properly to be inferred that there did exist such a consideration as would support the grant or

(1) 11 H. L. C. at p. 208; 35 L. J. (C.P.) at p. 35.

custom. And in the present case the plaintiffs contend that they have supplied such evidence as to justify the conclusion, both that the spot in question is part of an antient port, and also that they, and those whose estate they have, have supplied certain buoys, &c., for the benefit of the navigation, so long and under such circumstances as that it ought to be inferred that they and those whose estate they have are by immemorial usage bound to supply them, in consideration of the receipt of the anchorage-tolls. Either of those facts, if established, would be a sufficient consideration to support the custom; and the great question is, whether there appears enough on the special case to raise a presumption of either or both of those considerations, in support of an immemorial custom.

During the course of the argument an amendment was made, giving the Court power to draw all inferences of fact.

We must observe, in the first place, that, though the decision of the House of Lords finally determines that the receipt of anchorage-dues from time immemorial in a particular spot is not in itself sufficient to justify the inference that there must before the time of memory have been such a state of things in that spot as to make the perception of those anchorage-dues rightful, yet we certainly do not understand them to have questioned but that it is very important evidence tending to that conclusion; so that, if there be other evidence that there was an antient port near to the spot in question, the immemorial perception of anchorage-dues greatly strengthens the inference that there really was an antient port there, and is also strong evidence that the spot in which the anchorage-dues have been taken was within that antient port, as that would account for the taking of the dues, and shew that they were rightful. And, by a similar process of reasoning, any evidence tending to shew that buoys and beacons were supplied from time immemorial would be strengthened if it was shewn to be in an immemorial port; and such evidence also strengthens the evidence tending to shew that there was an immemorial port at the place where the antient buoys and beacons were maintained. We are not, therefore, to take any one part of the case by itself, and see whether that alone would be sufficient; but we must take the whole together.

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It is said by Lord Chelmsford, and we think agreed by all the Lords, in the *Free Fishers of Whitstable* v. *Gann* (1), that "every intendment ought to be made in favour of a payment which has been uninterruptedly received time out of mind, supposing it presumably capable of a lawful origin;" and what we have to do is, taking the whole case together, to see whether enough is shewn to justify the presumption of a legal origin to this payment. And we have come to the conclusion that there is enough, and consequently that the decision of the Court below must be affirmed.

It appears from the statements in the case that the manor of Whitstable is an antient manor. And from the proceedings before the justices in eyre set out in par. 23, it appears that in the 21 Edw. 1, Alexander Baliol, as tenant by the curtesy, and John Earl of Athol, as tenant in fee, of the manor of Whitstable and hundred of Whitstable, claimed to have had, inter alia, from time immemorial, in the said manor, free-warren and wreck of the sea, and toll with merchandize at Le Craston, in the same manor; and that they and the ancestors of John, from time whereof memory is not, have had the said liberties without interruption. On this claim issue was joined; and, so far as regards the manor, the verdict was for the claimants, and their claim to hold these franchises was allowed.

Two years earlier, the influence of the great barons had obtained from Parliament a declaratory act, 18 Edw. 1, that all who could verify by good inquest of the country, or otherwise, that they and their ancestors or predecessors have used any manner of liberties whereof they were impleaded by writs of quo warranto before the time of King Richard the First, or in all his time, and have continued hitherto, should have their liberties allowed. "By this act," says Lord Coke (2), "continuance of possession of liberties from the beginning of the reign of Richard the First till this act, which was under a hundred years, should be a bar to the Crown, if so it were found by inquisition, which was the time of prescription that bound the subject in case of prescription." We have it, therefore, established by the verdict of the jury that the lord of this manor from time immemorial down to the 21 Edw. 1, and from that date by the allowance in eyre, took toll with mer-

(1) 11 H. L. C. at p. 222; 35 L. J. (C.P.) at p. 40. (2) 2 Inst. 495.

chandise at Le Craston, in the manor of Whitstable. It does not appear to be now known what place was designated by the name of Le Craston. It is suggested, but without any apparent reason, that it is the same spot more recently designated as Greystones. As, however, it is not now known where Greystones was, this is of very little consequence. It does appear that Le Craston was within the manor of Whitstable. This record proves that from time immemorial toll was taken by the lord of the manor on merchandise landed at a spot within the manor, which of course could not be unless ships had from time immemorial come there, and discharged merchandize there. In Hale, de Portibus Maris, c. 4, Lord Hale states that, in consideration of a port, two things are involved,—first, the interest in the soil both of the shore or town, which is the caput portûs, and of the soil of the haven itself,—second, the interest of the franchise; and that both are acquirable by prescription, without any other formality appearing, though presumed. Ex diuturnitate temporis omnia presumuntur rite acta. He then says (1): "And upon the same title and account they may be settled and lodged in a subject as well in point of propriety of soil as in point of franchise; and so were many ports of the sea which were enjoyed by subjects by the title of prescription, without any charter thereof extant, or at least for most of them: and of this we shall give some instances." Amongst the instances cited by Lord Hale, two are material, as shewing the weight of the evidence furnished by the proceedings in eyre in the 21 Edw. 1. The first is that of Sutton Poole, now called Plymouth, which was determined to be parcel of the manor of Tremanton at the time it was the property of the subject, and as such to pass to the Duchy of Cornwall by a grant of the manor, without any special mention of the port or water. "But," says Lord Hale (2), "it passed by the strength of its being parcel of and appendant to the castle of Tremanton." In *Mayor of Exeter* v. *Warren* (3), the Court in their judgment, citing a remark of Lord Hale's, that the port was part of the fee granted to the corporation of Exeter, observe, "We do not cite this passage as proof of the fact, but as shewing that, according to that great lawyer's opinion, there is nothing in such a state of things unreasonable, or which may not

(1) De Portibus Maris, p. 55. (2) Ibid. p. 57. (3) 5 Q. B. at p. 801.

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easily be presumed, on proper evidence of user:" and this was in effect their decision.

There is, therefore, very strong authority for saying that a port at Whitstable might by prescription be parcel of the manor of Whitstable, and pass as such by the conveyances of that manor.

The second instance is that of Topsham, which belonged to the Earls of Devon: and Lord Hale's summary of the reasons for holding it to belong to them is as follows (1):—"Upon these records it appears,—first, that the Earls of Devon had the propriety of the soil of the port by prescription, for, they had all the profits that arise by reason of the property of soil, viz. the fishing and the salt-marsh, which possibly might be an incrementum maritimum,—secondly, they had also the franchise of the port by prescription, and all the incidents thereof, viz. 1. applicatio navium, 2. exoneratio navium, 3. mercatum et venditio mercandisarum in gross et per retail, 4. victualling of mariners and ships, 5. lodging and entertainment of mariners; all which are privileges in a special manner belonging to ports, and which cannot be had without that liberty legally vested, as shall be shewn in due time."

The Earls of Athol, as lords of the manor of Whitstable, had the fishing in this spot by prescription: and the finding of the inquest in eyre that they had from time immemorial taken toll for merchandize, proves that from time immemorial the first two of the incidents mentioned by Lord Hale, viz. the coming of ships, and the unloading of ships, had existed there, and affords strong grounds for presuming that the other three incidents, viz. a market for the merchandize when landed, and victualling and lodging of ships and mariners in the vill of Whitstable, had also existed from time immemorial; for, merchandize could hardly be landed without them. And the taking of toll for merchandize landed is primâ facie a privilege which belongs to the lord of the port, and is a strong addition to the evidence which Lord Hale mentions in the case of Topsham. It does not, therefore, seem too much to say that Lord Hale would have thought this record alone sufficient evidence that the lords of the manor had, as such, by prescription, a port in the manor, which was parcel of the manor. Certainly it is a matter which, in the language of the Queen's Bench in

(1) De Portibus Maris, p. 56.

Mayor of Exeter v. *Warren* (1), may be presumed on proper proof of usage.

But the evidence on this head does not stop here. The two proclamations (mentioned in paragraphs 27 and 28) by King Edward the Second, and the report under the commission in 7 Eliz., are strong evidence of reputation that Whitstable was a port; and the fact that anchorage-toll has been from time immemorial taken there, which would not in general be legal except within the precincts of a port, confirms this. Then, the description of the place in question in par. 5, and shewn on the map, is such as to make it very probable that in antient times, before memory, a port, though not a large one, would be established there, and anchorage taken by the lord of the manor in consideration of his consent. The oyster-beds on the Strette and the Ridge, in all probability were private property from the time of the Romans, who, we know, greatly esteemed the oysters in this neighbourhood; and at the same time they formed a breakwater protecting the anchorage. Vessels could not discharge cargo on the shore without obtaining leave from the owner of the shore; and, when coming into the anchorage-ground, must have been liable to lie too far out, so as at once to injure the oysters and be exposed to the surf. It would seem, therefore, a very reasonable arrangement, if the owner of the shore and of the oyster-beds were to agree with the public that he would give facilities to vessels to land their goods, and so encourage their resort there, and would put up buoys and beacons to mark out where the anchorage-ground was, so as at once to enable them to avoid his oysters and get safely into the anchorage-ground; he making it a condition that they would avoid his oyster-beds, and pay a reasonable due for anchoring at the spot. An agreement of this sort in modern times between the Crown (on behalf of the public) and a subject, evidenced by a charter accepted by the owner of the soil and fishery, would be valid; and, if all parties before legal memory acted as if such an arrangement was made, the arrangement would be binding by prescription.

It appears by par. 18, that, so long as living memory goes, all parties have acted as if such an arrangement had been made; and that is sufficient to raise a presumption that they had so acted

(1) 5 Q. B. at p. 801.

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before the time of legal memory, unless there is something to rebut that presumption.

It was contended that the terms of the advertisement in December, 1773, were such as to shew both that the buoys and beacons were then put down for the first time, and that their sole purpose was to protect the oysters; but we do not think this the true inference from the language used. It would not have been legal to set up the buoys and beacons for such an object, unless similar buoys and beacons had existed there before from time immemorial; and we think that the terms of the advertisement are quite consistent with the buoys and beacons having been allowed to fall into decay, and being then recently renewed.

We think, therefore, that there is ample evidence to justify the presumption both that there was here by prescription an ancient port, and that before the time of memory the lord of the manor, being also owner of the fishery and soil under the sea, had consented to the formation of the port, on the terms that he should have toll on merchandize landed, and anchorage from vessels anchoring or grounding in the haven; he at the same time agreeing to keep up the buoys, chiefly in all probability for the object of protecting the oysters, but incidentally guiding vessels to the safe anchorage. If this was so, there was ample consideration to support the customary payment; and we think that, in order to support an immemorial payment, we ought to make this presumption.

The judgment of the Court of Common Pleas will therefore be affirmed.

I have to add that my Brothers Channell, Blackburn, and Mellor, concur in this judgment.

BRAMWELL, B. I have to deliver my judgment, in which my Brother Martin concurs.

The law which is to govern this case is clearly laid down for us by the House of Lords in *Gann* v. *The Free Fishers of Whitstable*. (1) Lord Westbury says (2): "If the payment be claimed as an ancient anchorage-due, some facts must be shewn which either prove or from which it can be inferred that the soil claimed

(1) 11 H. L. C. 192; 35 L. J. (C.P.) 29.

(2) 11 H. L. C. at p. 208; 35 L. J. (C.P.) at p. 35.

by the respondents was originally within the precincts of a port or harbour, or that some service or aid to navigation was rendered to the public, in respect of which the alleged grant was made: but nothing of the kind appears." Again, he says: "There is no fact or circumstance to warrant a presumption that any corresponding benefit was given to the public in return for the imposition of this anchorage-due." Lord Wensleydale says (1): "To make a grant of anchorage in an arm of the sea, where the fundus maris is the property of the Crown, but where every subject of the Crown has a right to navigate, and to cast anchor when and where he thinks fit, as a necessary means of safe navigation, he cannot be deprived of that right by a usage, however long, unless there is some evidence of a sufficient consideration, of some advantage to the subject, to enable the Crown to confer upon a particular individual the privilege of receiving compensation from the subject, and thus depriving the subject of his undoubted right." (2) The House of Lords has also told us that the consideration for the charge must be shewn independently, and not be assumed from long enjoyment. Lord Westbury says (3): "No such case can be presumed or inferred from the mere fact of an immemorial payment."

This is the law which is to guide us. It is clear and distinct, and we are to apply it. The questions are,—Is there any evidence of a consideration in fact? If there is, is that consideration sufficient in law? And, if there is such evidence, is that evidence strong enough to make us find as a fact that the suggested consideration really was and is the consideration? For my own part, I see no evidence of it: if there is any, certainly not enough to satisfy me; and I will not find as a fact what as a fact I believe to be untrue.

With respect to the lights being a consideration, those in the boats date from 1858 only; those on shore never seem to have been maintained by the plaintiffs or those under whom they claim. On the contrary, they themselves seem always to have paid the persons who maintained the lights,—except that recently they have not paid the South Eastern Railway Company. Further, those lights were maintained by persons not connected with the

(1) 11 H. L. C. at p. 210; 35 L. J. (C.P.) at p. 36.

(2) So in the report.

(3) 11 H. L. C. at p. 208; 35 L. J. (C.P.) at p. 35.

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lord of the manor at a time when the lord was receiving the alleged anchorage-dues. They could not, therefore, then have been the consideration for his claim, and cannot be so now for that of the plaintiffs. As to the poles, buoys, and beacons, though they may be of use to guide vessels using the anchorage-ground, they are not put there for that purpose, but, as is found, are put there to warn vessels off the oysters. It seems to me as reasonable to claim a payment in respect of *them* as it would be to claim a toll for the use of the Queen's highway, on account of a notice not to trespass extra viam. But, again, these poles, buoys, and beacons are modern. The notice of December, 1773, says the *buoys* have *lately* been put down; and it is reasonable to infer that until the buoys, there were no poles or beacons, which, indeed, without the buoys, would be useless to navigation. And, further, the poles, buoys, and beacons were maintained by the plaintiffs at a time when the right (such as it is) to the anchorage was in the lord of the manor. They were, therefore, not the consideration for the claim then, and cannot be now.

The question may be tested thus:—Is there any duty on the plaintiffs to provide those lights or buoys or beacons? Certainly not. Neither is there any right in respect of their maintenance.

The next suggested consideration is, that Whitstable was or is a port. Also that it was a landing-place, with right of toll. Now, I agree that, if it was a port in the sense of a harbour or place of refuge, wholly or partly artificial, there would be a good consideration for the claim. But it is not. The anchorage is found to be natural holding ground with natural breakwaters. The landing-place is not used. Besides, it is clear that the anchorage-dues and the charge for landing are different things, and differently spoken of. I think there is evidence that Whitstable is a port. But, assuming that to be so, it is no consideration for this claim. It is no more a consideration for a claim on a vessel anchoring on that ground, than it would be for a claim on a vessel sailing over it; and it would be none for that: see *Free Fishers of Whitstable* v. *Gann*. (1) "Had the claim under consideration been in respect of passing over the locus in quo, it is clear the prescription could not have been supported." (1) It is no more a consideration for a

(1) 13 C. B. (N.S.) at p. 860; 32 L. J. (C.P.) at p. 197.

claim on a vessel anchoring there than on a vessel anchoring anywhere else. There is no connection between the consideration and the claim. The port neither offers to nor confers on a vessel anchoring there any benefit.

It is also to be borne in mind that the claim is not for a port-due, but for "anchorage" or "groundage." The very words themselves suppose that it is in respect of *anchoring* or *grounding* that the right exists. But I cannot do better than quote what Lord Chelmsford said (1): "In considering the question, it is necessary to bear in mind that it applies exclusively to the claim of a toll or due for anchoring on the high seas, and not in any port or haven. I mention this in the outset, because Mr. Lush, towards the close of his argument, contended that the toll might be regarded as being claimed in respect of a haven or port, Whitstable being a limb of Faversham, one of the cinque ports. The claim had never been put upon this ground in all the former discussions in the courts below; and it is clearly insufficient to sustain it. Mr. Lush admitted that the respondents were not the owners of the port, but suggested the possibility of the lords of the manor having obtained the port by devolution from the original owner. There is no ground whatever for this presumption; and, even if there had been, the anchorage-due is claimed, not in respect of the ownership of a port, but as a payment 'of right made to the lord of the manor.' The claim, too, is made solely in his character of lord, and not as the owner of a fishery; so that no question of competition between the right of passage of the public in the highway of the sea, and the right of an individual to have a several fishery there, can possibly arise." And again (2): "The necessity of discovering a quid pro quo for the claim in this case has driven the respondents to contend that the establishment of the oyster-fishery belonging to the respondents, being for the public benefit, might be considered to be a sufficient consideration for the imposition of the toll upon anchorage. It is difficult to understand how a benefit wholly unconnected with navigation, and not extending to the public generally, can be made the legal foundation for a local payment from vessels anchoring within a particular district. There

(1) 11 H. L. C. at p. 216; 35 L. J. (C.P.) at p. 38.

(2) 11 H. L. C. at p. 222; 35 L. J. (C.P.) at p. 40.

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is no reason why, if good to this extent, it should not be sufficient for a similar charge for all vessels casting anchor upon the soil of the Crown in any other part of the seas round this island."

It has occurred to me that the anchorage-ground is part of the high seas, open to the navigation of all mankind. Part of it is two miles from land. Now, although within the marine league from shore, and although between two headlands of this kingdom, I take it to be clear that a foreigner might navigate and anchor there. Could any toll be rightfully demanded of him? I think not; and, if not, why of a subject of this realm? I fully feel the importance of supporting claims to a thing long enjoyed. But, with great respect, I think there is a distinction to be noticed. This is not like a right of common, or rent-charge, or way, where the owner of the servient estate takes it with its burthen, and where he can no more complain of the burthen being on the estate than he can that an adjoining field does not belong to it.

This is a claim on strangers, wayfarers, whose convenience or necessities (as found in the case) may bring them on to the anchorage-ground; and it is mischievous in this way, that it makes one part of the high seas a place to be avoided. I cannot but look on this as an usurpation from the beginning,—demanded by those who received the payment, perhaps believing, as others did till the decision in the House of Lords, that it was due without consideration (for, it was never pretended or suggested there was any consideration till the House of Lords said that one was necessary), and paid by those who, being strangers and inferior in rank and intelligence, were unable to say the claim was not well founded.

I do not believe as a fact that the existence of the port was the consideration for this claim. I do believe it was not. I am of opinion that if it was, it was a bad consideration, as not being connected with the claim. Therefore I must find for the defendant below, and accordingly, in my opinion, judgment should be given for him.

Judgment affirmed.

Attorneys for plaintiffs: *Nethersole & Speechley, for S. & E. Plummer, Canterbury.*

Attorneys for defendant: *Mercer & Mercer, for Towne, Margate.*

[IN THE EXCHEQUER CHAMBER.]

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June 20.

DANIEL *v.* THE METROPOLITAN RAILWAY COMPANY.

Practice—Appeal under Common Law Procedure Act, 1854 (17 & 18 *Vict.* c. 125), *ss.* 34, 35—*Court to draw Inferences—Negligence—Railway Company—Absence of due Precaution.*

A verdict was entered for the plaintiff, by consent, subject to leave reserved to the defendants to move to set it aside, and instead thereof to enter a verdict for them, or a nonsuit, on the ground that there was not sufficient evidence of negligence to support the plaintiff's case,—the Court to be at liberty to draw inferences of fact, and to adjudge upon the evidence. Upon appeal to the Exchequer Chamber, under the Common Law Procedure Act, 1854, ss. 34, 35, the evidence being set out in the case,—

Held, that the Court of error were to find such a verdict as in their judgment a jury ought upon the evidence to have found.

The plaintiff, while travelling by the defendants' railway, was injured by the fall of a girder, through the negligence of workmen employed by a contractor (unconnected with the defendants) whilst placing it across the retaining walls of the railway. It was proved that the work in question was extremely dangerous, though none of the witnesses had ever known of a girder falling; that it was the practice, when such work was being done over railways, for the company to place a man to signal to the work-people the approach of a train; and that this precaution was not adopted on the occasion in question; but there was no evidence that the company's servants knew that the girder was in the course of being moved at the time the train was passing, or of the means used by the contractor for moving it:—

Held, upon a case in which the Court were to be at liberty to draw inferences of fact,—reversing the decision of the Court of Common Pleas,—that as a fact the defendants were not guilty of negligence, although the evidence of negligence was such that it could not have been withdrawn from the jury.

APPEAL by the defendants from a decision of the Court of Common Pleas (1), discharging a rule to enter a verdict for them or a nonsuit, on the ground that there was no sufficient evidence to support the plaintiff's case and to prove such negligence as alleged in the declaration.

The case on appeal set out the evidence, and concluded with the following statements:—

" At the close of the plaintiff's case, and on the suggestion of the learned judge, a verdict was by consent entered for the plaintiff, subject to leave reserved to the defendants to move to set it aside,

(1) Ante, p. 216.

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and instead thereof to enter a verdict for them or a nonsuit, on the ground that there was not sufficient evidence of negligence to support the plaintiff's case,—the Court to be at liberty to draw inferences of fact, and to adjudge upon the evidence.

"The defendants, in pursuance of the leave so reserved, on the 4th of November, 1867, obtained a rule to shew cause, which rule the Court of Common Pleas on the 10th of February, 1868, discharged.

"The question for the Court of appeal is, whether the rule of the 4th of November, 1867, ought to have been discharged or ought to have been made absolute upon all or any of the grounds therein stated.

"The Court of appeal to make such rule upon this appeal as it shall think fit, and to proceed therein pursuant to the provisions of the Common Law Procedure Act, 1854."

June 19. *C. Pollock, Q.C.* (*Hawkins, Q.C.*, and *H. Lloyd, Q.C.*, with him), for the appellants (defendants below). There was no evidence to warrant a jury in finding that the defendants had been guilty of any negligence. The mischief which happened was solely the result of negligence on the part of persons over whom the defendants had no control, and of whose mode of proceeding with the work they were employed on they were wholly uninformed. To render the defendants liable for the consequences of an act done by a third person upon the land of a stranger, as was the case here, it should have been shewn, not only that they were cognizant that the works were going on above the railway, but also that they were aware that they were being conducted in such a manner as necessarily, or at least probably, to endanger passengers on the line. The evidence disclosed in the case fails to lead to any such conclusion.

[BLACKBURN, J. Are we upon this appeal to say as jurymen which way we should have found the verdict?

KELLY, C.B. We stand in the position of judge and jury; just as an arbitrator does. The question we have to determine is, what the defendants should have done, and when.]

Day (*Morgan Howard* with him), contrà. If this Court is sitting as a Court of error, it will be enough for the plaintiff to satisfy

it that there was evidence of negligence to go to the jury. If, however, the Court is at liberty to draw inferences of fact, as the Court below might do, it will be necessary to shew that the evidence warranted a verdict for the plaintiff.

[BLACKBURN, J. I apprehend we must dispose of this as if it were a special case, with liberty reserved to the Court to draw inferences of fact. We are to draw the same inferences from the evidence set out which we think the Court below should have drawn.]

The defendants knew, or ought to have known, that the work,—a work of extreme peril to trains passing along the line whilst it was proceeding,—was being done, and they took no precautions whatever to guard against the danger.

[BRAMWELL, B. Where is the evidence of danger? The witnesses, it is true, say that the placing of girders is dangerous work: but they all add, that they never knew of an accident of the kind happening before.]

In all the cases referred to by the several witnesses, extraordinary precautions seem to have been adopted. Men were invariably placed to signal when a train was approaching the point of danger. Nothing could justify the total absence of precaution found here.

Pollock Q.C., was heard in reply.

Cur. adv. vult.

June 20. The judgment of the Court (Kelly, C.B., Bramwell and Channell, BB., Blackburn and Hannen, JJ.) was delivered by

BLACKBURN, J. This case is reserved in rather a peculiar manner. Nothing was left to the jury; but a verdict was entered for the plaintiff by consent, "subject to leave reserved to the defendants to move to set it aside, and instead thereof to enter a verdict for them, or a nonsuit, on the ground that there was not sufficient evidence of negligence to support the plaintiff's case,—the Court to be at liberty to draw inferences of fact, and to adjudge upon the evidence." The meaning of that reservation is, that the Court is to find a verdict upon the evidence as a jury should have done. The Court of Common Pleas having found a verdict for the plaintiff, we are bound upon this appeal to find such a verdict as we think a jury ought upon the evidence laid before us to have found.

We entirely agree with the law laid down by the Court below,

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that railway companies are bound to take reasonable care to carry their passengers safely. And that, if the particular work was such that a reasonable person having the management of the line would have adopted some precautions with a view to lessen or avoid the danger, it would be the duty of the company to adopt such precautions. And we also agree with the Court below that there was evidence on that point to go to the jury, and that there could not have been a nonsuit, nor possibly a rule as for a verdict against the weight of evidence. But, when it is reserved to us to find a verdict according to the evidence and the inferences we draw from it, we unanimously come to the conclusion that the persons whose duty it was to take precautions were the persons by whom the work was being carried on; and that, though the defendants as reasonable persons must have known that girders if negligently handled are likely to fall, they could have no reason to suppose that the persons who were doing the work would do it so negligently as to hazard the happening of such an event. It is solely upon this ground that we think the judgment of the Court below should be reversed.

Judgment reversed.

Attorneys for plaintiff: *Harcourt & Macarthur.*
Attorneys for defendants: *Burchells.*

June 24.

SELBY *v.* GREAVES.

Landlord and Tenant—Demise of portion of Room in Factory, with Steam-power—Creditor's deed—Bankruptcy Act, 1861 (24 *&* 25 *Vict. c.* 134), *s.* 197—*Bankrupt Act*, 1849 (12 *&* 13 *Vict. c.* 106), *s.* 129.

A. let to B. a defined portion of a room in a factory, with steam-power for working lace-machines belonging to B., at a certain sum per annum, payable quarterly; a deduction to be allowed in the event of hindrances in the supply of power beyond seven days in each quarter:—

Held, a sufficient demise to entitle A. to distrain.

By a deed (duly registered) in the form given in Schedule D. to the Bankruptcy Act, 1861, to which the required majority of the creditors assented, B. assigned all his effects to a trustee, "to be applied and administered for the benefit of the creditors in like manner as if B. had been at the date thereof duly adjudged a bankrupt:"—

Held, that the title of the trustee, under s. 197 of that act, dated from the

execution of the deed; and that a distress for rent levied between that time and the day of registration could not, by reason of s. 129 of the Bankrupt Act, 1849, be made available for more than one year's rent.

Williams v. *Cadbury* (Law Rep. 2 C. P. 453), distinguished.

DECLARATION by John Selby, the trustee on behalf of the creditors of James Flather, a debtor under a deed made between James Flather and his creditors and the plaintiff as trustee, relating to the debts and liabilities of James Flather and his release therefrom, according to the Bankruptcy Act, 1861.

First count, that James Flather, before the execution of the deed, was tenant to the defendant of a workshop and fixtures at a certain rent payable by Flather to the defendant, and that the defendant, after the execution and registration of the deed, wrongfully distrained in the demised premises goods of the plaintiff as such trustee, as a distress for pretended arrears of the rent, and wrongfully sold the goods as such distress, whereas no rent was due, &c.

Second count, for an excessive distress; third, for not selling for the best price; fourth, for breaking and entering a workshop or factory of the plaintiff, and converting his goods; fifth, for a conversion.

Sixth, that, before the making of the deed, Flather was tenant to the defendant of a factory or workshop, at a certain rent payable by Flather to the defendant; that the defendant, after the execution by Flather of the deed, and the due registration thereof, and after all things required by the Bankruptcy Act, 1861, had been done and happened, distrained goods of the plaintiff as such trustee, of greater value than one year of the said rent and of the charges of the said distress in the factory or workshop, as a distress for certain arrears of the rent exceeding one year's rent, accrued due prior to the date and the time of the execution by Flather, and the registration respectively of the deed, and afterwards sold the goods, as and for such distress for the said arrears, and thereby made the said distress available for more than one year of the rent accrued prior to the date, execution, and registration respectively of the deed, contrary to the statute, &c.

Seventh count for not leaving the overplus in the hands of the sheriff, undersheriff, &c. Counts for money received and for money due upon accounts stated.

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Pleas: 1. That plaintiff was not trustee. 2. Except as to the money counts, not guilty, by statute 11 Geo. 2, c. 19, s. 21. 3. That the goods were not the goods of the plaintiff as such trustee. 4. That the workshop or factory, in the fourth count mentioned was not the workshop or factory of the plaintiff as such trustee. 5. As to the money counts, never indebted. Issue thereon.

The cause was tried before Hannen, J., at the last spring assizes at Nottingham. The facts were as follows:—James Flather, who was a lace-manufacturer at Nottingham, on the 18th of June, 1867, executed an assignment under the Bankruptcy Act, 1861, of all his effects to the plaintiff as trustee for his creditors, the deed being in the form given in Schedule D. to the act. At the time of the assignment, Flather was possessed of six lace-machines and other property used in his trade of a lace-maker, which were upon premises belonging to the defendant.

In the town of Nottingham, large buildings known as lace-factories are erected for the purpose of being divided into a series of shops or rooms, mostly separated by wooden partitions, each shop or room being occupied by a separate lace-maker with his own machines, under an agreement with the landlord to pay him a certain sum by way of what is called rent for the use of the room and the supply by the landlord of steam-power to drive his machines, and also gas. The machinery and gearing are generally kept oiled by the landlord, who for that purpose has a duplicate key of each room. Flather held of the defendant half a room (divided from the remainder by a partition of wood), under a written agreement. The agreement had been lost, and there was some conflict of evidence as to its terms. It was proved, however, to be substantially as follows:—

"Memorandum of agreement for rent made by William Greaves, of, &c., on the one part, and James Flather, lace-manufacturer, of, &c., on the other part:

"I, the undersigned W. Greaves, builder, &c., agree to let, and James Flather agrees to rent half the room called No. 7, in the third storey in the factory in Station Street, in the town of Nottingham, to be supplied with a sufficient steam-pipe and sufficiently supplied with steam for the heating of the said half-room, and a

line-shaft connected with the steam-engine, for the driving of any number of lace-machines, with winding, &c., engines. To be driven twenty hours per day (all holidays excepted); for which we agree the rent shall be 50*l.* for the first year, and after the first year we agree to let and provide and rent aforesaid for the sum of 65*l.* per annum. The rent to be paid quarterly, that is to say, the 24th day of June, the 29th day of September, the 25th day of December, and the 25th day of March in each and every year.

"We further agree, in case of accident or breakage to either engine or gearing belonging to the said W. Greaves to cause an hindrance not exceeding seven days in one quarter, such hindrance to be made up by the engine working extra hours; and, if an hindrance as above shall exceed seven days, such time to be deducted from the rent on the next quarter's rent-day, at the rate of rent then paying. We further agree to give and accept six months' notice in writing from any given quarter-day.

(Signed) "William Greaves.
"James Flather."

"N.B. With an allowance of one-half the first quarter's rent (only) for hindrances.

"March, 1852."

In 1862 or 1863 an arrangement was come to under which the rent was reduced to 58*l.* 10*s.*

The deed of assignment having been executed on the 18th of June, 1867, possession of all the effects upon the premises was taken by the plaintiff, the trustee, on the following day, and one Berridge was put in possession. On the 25th, whilst Berridge was absent at his dinner, Flather's room was entered (there was conflicting evidence as to whether or not the door had been broken open) by a broker and his assistants, and the lace-machines in question were seized as a distress for 327*l.* 12*s.* 6*d.*, being the defendant's claim for five and a half year's rent. On the 27th of June the defendant had notice of the execution of the deed. The property seized was sold by auction on the 2nd of July, and realized 312*l.* after payment of the expenses. There was some evidence to shew that, although the sale was fairly conducted, the machines would have fetched more if sold by the trustee by private contract. The deed was registered on the 15th of July.

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The execution of the deed by the debtor and by the trustee, and the assent of all the creditors (except the defendant) whose debts respectively amounted to 10*l.* and upwards, was proved: and it was mutually conceded that the amount of rent due to the landlord for one year's rent was 58*l.* 10*s.*, and that the overplus had not been left in the hands of the sheriff.

For the plaintiff it was contended that the agreement of March, 1852, did not create the relation of landlord and tenant between the defendant and Flather, the so-called rent being only a stipulated payment for the privilege or easement of the standing of the machines and the use of the steam-power; and for this *Hancock* v. *Austin* (1) was relied on. It was further contended on the authority of *Williams* v. *Cadbury* (2), that by force of s. 129 of the 12 & 13 Vict. c. 106, and s. 197 of the 24 & 25 Vict. c. 134, the defendant was at all events not entitled to make the distress available for more than one year's rent.

The learned judge intimated an opinion that the defendant was entitled to distrain; and the jury negatived the breaking and entering; but, in answer to a question put to them, found that the sale under the distress realized less by 25 per cent. than it would have done if the trustee had sold. A verdict was thereupon taken for the defendant, leave being reserved to the plaintiff to enter a verdict for him for 312*l.* (the proceeds by the sale), or for such sum as the Court might direct.

O'Brien, Serjt., in Easter Term last, obtained a rule nisi accordingly.

Hayes, Serjt., and *Cave*, shewed cause. The distress must be assumed to have been regular if the relation of landlord and tenant was created between the parties. In *Hancock* v. *Austin* (1), there was no demise of any part of the room, but a mere grant of an onstand, with the use of power. Here, however, there was a distinct demise of a specific portion of the room, which was partitioned off from the rest, and the exclusive possession of which was held by Flather. The supply of steam-power was, no doubt, part of the consideration for the rent, as was the furniture in *Newman*

(1) 14 C. B. (N. S.) 634; 32 L. J. (C.P.) 252.
(2) Law Rep. 2 C. P. 453.

v. *Anderton* (1), and yet the landlord was held entitled to distrain. The second question turns upon the construction of s. 197 of the Bankruptcy Act, 1861, which makes all the provisions of the former Bankrupt Act applicable to deeds under s. 192, so far as they are capable of being applied. One of those provisions is s. 129 of the 12 & 13 Vict. c. 106, which provides that no distress for rent made after an act of bankruptcy shall be available for more than one year's rent. Now, the deed was executed on the 18th of June, 1867. The distress was levied on the 25th. The sale took place on the 2nd of July; and the deed was registered on the 15th. There was no act of bankruptcy therefore, nor anything analogous to an act of bankruptcy, until the registration took place, and then the defendant was no longer a creditor. In *Williams* v. *Cadbury* (2), the distress was *after* registration. The time of registration is treated by all the Court as the dividing line: it is put upon the same footing as an adjudication of bankruptcy. The like was held in the case of a claim of set-off, in *Stanger* v. *Miller*. (3) Pollock, C.B., there says (4): "Registration is to be taken as the event which fixes the rights of the parties, and the date of registration as the time corresponding to the adjudication." And Bramwell, B., says (5): "We must read this section (s. 197) as applicable as well to deeds binding those who are parties to them, as to those which bind other persons not parties. Now, it is impossible to say that a deed executed on a given day, not announced to the world, but kept in the debtor's pocket, should, on being registered, have a retrospective effect given to it, carrying back its operation twenty-eight days, or for such further time as the Court of bankruptcy may, under s. 194, allow for its registration. The deed becomes an official document at the time when it has an official sanction given to it by registration; and this is the point of time which we are to consider as that which fixes the rights of the parties concerned." See the hardship which would be imposed upon the landlord by a contrary construction. It is not necessary to give him notice of the execution of a deed. Having distrained, is he to stay his hand in order to ascertain

(1) 2 N. R. 224.
(2) Law Rep. 2 C.P. 453.
(3) Law Rep. 1 Ex. 58.
(4) Law Rep. 1 Ex. at p. 62.
(5) Law Rep. 1 Ex. at p. 63.

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whether or not the deed will be registered within the prescribed time? If he limits his distress to a year's rent, he could not distrain again. In *Ex parte Mendel* (1), where Lord Westbury held that the date of a trust-deed in the form set out in Schedule D. to the Act of 1861, is equivalent to the time of adjudication, the question was as to the time at which the rights of the creditors were to be ascertained, or, in other words, what was the class of persons for whom the trustees were trustees. In *Notley* v. *Buck* (2), which turned upon the proviso in 6 Geo. 4, c. 16, s. 108, the execution was incomplete at the date of the fiat. In this respect the case was like *Williams* v. *Cadbury*. (3) In *Morland* v. *Pellatt* (4), an execution was completed before the fiat, and the creditor was allowed to retain the money. Parke, J. in that case says (5), "I think it clear that the latter part of the 108th section cannot deprive any execution-creditor of his remedy, unless he is a creditor having security at the time of the bankruptcy, and then seeking to avail himself of the execution to the prejudice of other fair creditors." At the time of the registration of this deed, the landlord was not seeking to avail himself of the distress.

O'Brien, Serjt., and *Beasley*, in support of the rule. *Hancock* v. *Austin* (6) is precisely in point. Looking at the substance of the agreement as proved, and the usage of the place, it is plain that the supply of steam-power was the principal subject of the contract, the rest being subordinate. In *Rex* v. *Mellor* (7), a contract for a standing place in a mill for a carding-machine which was fastened to the floor and the roof, for the purpose of being worked by the steam-engine of the mill, for which the owner of the machine was to pay 20*l.* a year, with liberty to quit on three months' notice, was held not to be a taking of a tenement so as to confer a settlement under the Poor Law, but a mere licence to use the machinery of the mill.

[WILLES, J. In *Robinson* v. *Learoyd* (8), the plaintiff, the owner of a woollen-mill and steam-engine, let to the defendant a room in the mill, together with a supply of power from the steam-engine

(1) 1 De G. J. & Sm. 330; 33 L. J. (Bkr.) 14. 10 Jur NS 189
(2) 8 B. & C. 160.
(3) Law Rep. 2 C. P. 453.
(4) 8 B. & C. 722.
(5) 8 B. & C. at p. 727.
(6) 14 C. B. (N. S.) 634; 32 L. J. (C.P.) 252. 10 Jur NS 77
(7) 2 East, 189.
(8) 7 M. & W. 48.

by means of a revolving shaft in the room. In an action for double value under the 4 Geo. 2, c. 28, against the tenant for holding over after the expiration of a notice to quit, the question was whether, in estimating the double value, the value of the power supplied was to be included. The Court held that it was not; but the whole argument seemed to imply that there was a letting. Here, a specific portion of the room was let to Flather. That seems to be a demise.]

To constitute a demise, the rent must be certain both in its amount and in the times of payment: *Parker* v. *Harris* (1), where a reddendum "after the rate of 18*l.* per annum" was held void for uncertainty. Here, the rent seems to have been varied if there were any stoppages from time to time in the supply of steam power. This clearly was not such a holding as entitled the party to be rated: *Reg* v. *Morrish.* (2)

A trustee under a deed of this sort stands in all respects in the same situation as the assignee of a bankrupt. The execution of the deed was an act of bankruptcy, and notice of it to the defendant was notice of an act of bankruptcy: *Ponsford* v. *Walton.* (3)' Immediately upon its registration, the deed, by the operation of s. 197 of the Bankruptcy Act, 1861, becomes from the date of its execution by the debtor equivalent to an adjudication of bankruptcy. The form of deed given in Schedule D. supports this view, and is the ground of the decision in *Ex parte Mendel.* (4) At the time of the execution of the deed, the trustee became possessed of the property assigned; and upon its registration, he became invested with all the rights of an assignee in bankruptcy: *Re Price.* (5) As far as it goes, *Williams* v. *Cadbury* (6) is in favour of the plaintiff, though it was not necessary there to decide the point raised here. The execution of the deed is the governing period: the registration is only a ministerial act. It would be contrary to the whole scope and policy of the bankrupt law to allow the landlord to take the whole of the debtor's property after an assignment for the general benefit of his creditors.

(1) 1 Salk. 262.
(2) 32 L. J. (M.C.) 245.
(3) Ante, 167.
(4) 1 De G. J. & Sm. 330; 33 L. J. (Bkr.) 14.
(5) Law Rep. 2 Ch. App. 662.
(6) Law Rep. 2 C. P. 453.

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Stanger v. *Miller* (1) in reality decides nothing. The judgments of the Chief Baron and Bramwell, B., would have been the same whether the time referred to was the execution of the deed or its registration.

WILLES, J. I am of opinion that the rule ought to be absolute to enter a verdict for the plaintiff for the lesser amount, on the footing that there was a right to distrain, but only so as to make the distress available for one year's rent. With respect to the first question, viz. whether there was a demise, it appears to me to be altogether a question of fact. There was a written document under which the letting took place. That document would be the proper source from which to derive information as to the character of the letting; but, the document having been lost, it was necessary to have recourse to secondary evidence. Accordingly there was evidence on both sides; and the conclusion I arrive at is that the letting was not a mere letting of an onstand for the lace-machines, but a letting of a defined portion of the room separated from the remaining portion, with exclusive possession by the person taking it, and that possession was taken under that demise. If that be so, the supply of steam-power and gas would be merely ancillary, and a rent reserved for the whole would be construed as issuing out of the fixed property, as in the case of furnished apartments; and there would in like manner be a power to distrain, though the use of moveable property formed part of the consideration for the rent. It was objected that the rent here was uncertain, by reason of the provision for deductions in respect of possible failure in the supply of working power. But it is new to me that a rent is uncertain because it cannot be ascertained at the time of the demise what rent will become payable on a future contingency. If that were so, a reservation of rent at so much per ton of hay or per boll of wheat would be open to the same objection. So also in the case of an additional rent to be paid in the event of the tenant using the land in a particular manner. There the amount of rent must necessarily be uncertain, because you cannot tell beforehand whether or not the land will be so used. These payments are sometimes called penalties; but in truth they are rents payable by

(1) Law Rep. 1 Ex. 58.

reason of the additional use of the land, at per acre, or so forth. Such a rent may clearly be distrained for. The maxim, Id certum est quod certum reddi potest, applies. A thing is sufficiently certain when it may be made so by an arithmetical process. Upon the best consideration I can apply to this matter of fact, the conclusion I come to is, that this was as much a demise as if it had been a letting of the whole room or even of the whole house.

The second point depends upon whether the 129th section of the Bankrupt Act, 1849, is applicable to the case of a trust-deed conveying all the debtor's estate for the benefit of his creditors, in the form given in Schedule D. in the Bankruptcy Act, 1861, where the distress takes place between the time of the execution of the deed and its registration. That question may be considered in two lights,—first, whether the 129th section is applicable at all; and upon that we have the authority of a case of *Williams* v. *Cadbury* (1), in this Court, that it is. It is not necessary to discuss that again; though it may not be improper to say that I not only feel myself bound by it as an authority, but that I adopt it in reasoning, because it is clear that the words "after the issuing of the fiat or the filing of the petition for adjudication of bankruptcy," must be wide enough to include an adjudication on the petition of the bankrupt himself, and therefore are not confined to relation to the act of bankruptcy. I adopt the reasoning in the terms used in the judgment of my Brother Smith in the report in the Law Journal (2), where he says: "No doubt, the words 'after an act of bankruptcy,' in s. 129 of the 12 & 13 Vict. c. 106, are not applicable to the state of things under a deed registered under the act of 24 & 25 Vict. c. 134. But the only objection is that those words are not applicable; and there is no reason why the rest of the section should not apply, the period of time for its so applying being by the 24 & 25 Vict. c. 134 when the deed has been registered." That language was relied upon on the part of the defendant here to shew that it was intended to be intimated by this Court that until registration the trustees would have no rights. That, however, was an erroneous conclusion. The distress there having taken place after the registration of the deed, it was not necessary to

(1) Law Rep. 2 C. P. 453; 36 L. J. (C.P.) 233.
(2) 36 L. J. (C.P.) at p. 235.

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decide the question now before the Court; but it was necessary to decide at what time the distress must be made in order to be available for more than a year's rent: and it appears to me to have been properly decided that the time at which s. 129 applies is when the deed is registered. Up to that time, the deed can only operate as a deed at common law; it has no operation under the bankrupt law at all. That leaves altogether untouched the question presented for our decision here. The deed having been duly registered, the question is, what is its effect upon the previous distress? That depends upon the deed, before referring to which I must advert to the theory that these deeds under the Bankruptcy Act, 1861, so soon as the required majority of the creditors have executed or assented and the other requisites of the statute have been complied with, are binding upon non-assenting creditors as if they had executed. Therefore, from the moment of the registration of this deed, the defendant became bound by it. Now, what is the deed? It is a deed whereby Flather, the debtor, conveys all his estate and effects absolutely to a trustee, to be applied and administered for the benefit of his creditors in like manner as if the debtor had been at the date thereof duly adjudged a bankrupt. I entirely agree with the argument of my Brother O'Brien, that we have here in the form of deed sanctioned by the legislature a declaration of the time at which the title of the trustee is to accrue, so as to displace all intermediate transactions which may be inconsistent therewith. That time is the date of the deed: and it would be inconsistent that the landlord, regard being had to s. 129 of the 12 & 13 Vict. c. 106, should be in a better position than if the distress had taken place after an adjudication of bankruptcy.

Upon the whole, it seems to me that the trustee is entitled to call upon the landlord to account for the proceeds of the distress beyond what was due for one year's rent.

MONTAGUE SMITH, J. I am of the same opinion, upon both points. Upon the construction of the agreement, I think the half room was let in such a manner as to grant to the tenant the exclusive occupation of that part. The one party professed to let and the other to rent the subject-matter of demise. It seems to

me to be not at all improbable that the agreement was entered into advisedly in this form in order that the landlord's right to distrain should be clear of the difficulty raised in *Hancock* v. *Austin*. (1)

As to the second point, I also think that the date of the execution of the deed by the debtor is for the purpose of the application of s. 129 of the 12 & 13 Vict. c. 106, the point of time which is equivalent to the adjudication of bankruptcy mentioned in that section. The 197th section of the Bankruptcy Act, 1861, provides that, from and after the registration of the deed, the debtor and creditors and trustees, parties to such deed, or who have assented thereto or are bound thereby, shall in all matters relating to the estate and effects of such debtor be subject to the jurisdiction of the Court of bankruptcy, and shall respectively have the benefit of and be liable to all the provisions of the act, in the same or like manner as if the debtor had been adjudicated a bankrupt, and the creditors had proved, and the trustees had been appointed creditors' assignees under such bankruptcy; and the trustees and the creditors shall, as between themselves respectively, and as between themselves and the debtor, and against third persons, have the same powers, rights, and remedies with respect to the debtor and his estate and effects, and the collection and recovery of the same, as are possessed or may be used or exercised by assignees or creditors with respect to the bankrupt or his acts, estate, or effects. The question to be determined in *Williams* v. *Cadbury* (2) was, whether the 129th section of the 12 & 13 Vict. c. 106, restraining the landlord's remedy by distress to one year's rent, could be imported at all into the 197th section of the 24 & 25 Vict. c. 134. There was, no doubt, a difficulty in applying it in all its terms; and so there must be a difficulty in applying many of the provisions of the Bankrupt Act, 1849, to the state of things created by deeds under the Act of 1861: but the Courts have over and over again held that effect must be given to them cy près. The Court in that case held that, from and after the registration of the deed, the landlord was brought within the operation of s. 129 of the 12 & 13 Vict. c. 106, as in the case of an adjudication of bankruptcy. The pre-

(1) 14 C. B. (N.S.) 634; 32 L. J. (C.P.) 252.

(2) Law Rep. 2 C. P. 453.

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cise question raised here was not determined there, because in that case the distress took place after the registration of the deed. In the present case, however, it is necessary to determine whether the period of time which is to be equivalent to the time of adjudication is the date of the deed (the time of its execution by the debtor) or the day of registration. It seems to me that the time of the execution of the deed by the debtor is the time which must be regarded as equivalent to that of the adjudication of bankruptcy under the former act. The form of the deed, which is that prescribed by the legislature, and to which the majority of the creditors have assented, and to which all are to be considered as parties, and by which all are bound whether they have assented or not, is express that the estate is to be applied and administered for the benefit of the creditors in like manner as if the debtor had been *at the date thereof* duly adjudicated a bankrupt. This construction agrees with the decision of Lord Westbury as to the construction of s. 153 of the Bankrupt Act, 1849, with reference to a similar deed in *Ex parte Mendel.* (1) The result of our decision is, that the landlord was justified in distraining, but that he can only be allowed to make the distress available for one year's rent.

Beasley suggested that the plaintiff was entitled to add the 25 per cent. found by the jury to be the amount of depreciation by reason of the forced sale.

WILLES, J. Unless the sale were flagitious, the net proceeds would be the right sum, less 58*l.* 10*s.* for one year's rent. The verdict will therefore be for 253*l.* 10*s.*

Rule accordingly.

Attorneys for plaintiff: *G. L. P. Eyre & Co., for G. W. Heath, Nottingham.*

Attorneys for defendant: *Parke & Pollock, for Freeth, Browne, & Rawson, Nottingham.*

(1) 1 De G. J. & Sm. 330; 33 L. J. (Bky.) 14. 10 Jur NS 189

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June 24.

Certificate for Costs—3 & 4 *Vict. c.* 24, *s.* 2—"*Immediately afterwards*"—*Slander*—*New Trial for Insufficiency of Damages.*

In an action for slander a new trial will not be granted on the ground that the damages were insufficient, unless there has been a mistake in point of law on the part of the presiding judge, or a mistake in the calculation of figures or misconduct by the jury.

A verdict for 1*s.* having been given in an action for slander, no application was made for a certificate under 3 & 4 Vict. c. 24, s. 2, that the injury was wilful and malicious until ten days afterwards at the next assize town. The judge then stated that he had been considering the matter, and granted the certificate:—

Held, that the certificate was too late, and must be set aside.

FIRST count, by husband and wife, that the defendant spoke of the female plaintiff the words following:—"I saw Mrs. Forsdike, at half-past three o'clock this morning, coming out of my uncle's office with Jack, the butcher," the defendant meaning thereby that the female plaintiff had been guilty of adulterous conduct, whereby &c.

Second count, by the husband alone, for damage caused to his business of innkeeper by the same slander.

Pleas: 1. Not guilty. 2. That the words were not spoken in the sense alleged, and were true in fact. Issue thereon.

The case was tried before Pigott, B., at the spring assizes at Caermarthen on the 3rd day of March, when a verdict was found for the plaintiffs for 1*s.* No application was made to the judge at the time the verdict was given for a certificate under 3 & 4 Vict. c. 24, s. 2 (1), nor during the two days which the assizes continued at the town. The criminal business at Swansea, the next assize town, lasted five days, and on the first day of the civil business,

(1) 3 & 4 Vict. c. 24, s. 2:—"If the plaintiff in any action of trespass, or of trespass on the case, . . . shall recover, by the verdict of a jury, less damages than 40*s.*, such plaintiff shall not be entitled to recover or obtain from the defendant in respect of such verdict any costs whatever, . . . unless the judge or presiding officer before whom such verdict shall be obtained shall immediately afterwards certify on the back of the record, . . . that the action was really brought to try a right besides the mere right to recover damages, . . . or that the trespass or grievance in respect of which the action was brought was wilful and malicious."

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being the 13th of March, Giffard, Q.C., applied to the judge to certify, in accordance with the provisions of the above section, that the slander was wilful and malicious. The judge stated that he had been considering the matter ever since the case was tried, and that he had decided that the plaintiffs were entitled to a certificate, and he certified accordingly.

Giffard, Q.C., on the part of the plaintiffs, having obtained a rule to set aside the verdict on the ground that the damages were insufficient, and *J. W. Bowen* having obtained a cross rule to set aside the certificate for costs on the ground that it was not given *immediately* after the verdict was obtained, the two rules came on for argument together.

Hughes (*J. W. Bowen* with him) shewed cause against the rule for a new trial, and supported the rule to set aside the certificate. It will be convenient to discuss the latter rule first. The act 3 & 4 Vict. c. 24, s. 2 (1) gives no effect to a certificate unless it is granted "*immediately*" after the verdict; and though the cases shew that a reasonable meaning must be given to that word, there is no sense in which the present certificate can be said to have been given "immediately afterwards." In *Thompson* v. *Gibson* (2) it was held that a certificate given a quarter of an hour after the delivery of the verdict was given in time, but the reasons relied on by the judges in that case for holding that the certificate was in time shew that one given after an interval of ten days would be too late. In *Page* v. *Pearce* (3) the act is interpreted to mean that the certificate must be given within a reasonable time. In that case the certificate was given the same day, and the under-sheriff had referred to the subject at the close of the trial, and said that he would consider the matter. In *Nelmes* v. *Hedges* (4) the verdict was taken by the associate late at night, after the judge had left the court, and an application was made to the judge at the sitting of the court the following morning, who granted it after the jury had been sworn in the first cause. The certificate was held to be in time, but Patteson, J., in delivering the judgment of the court, referred to a case which does not appear to be reported,

(1) See ante, p. 607.
(2) 8 M. & W. 281.
(3) 8 M. & W. 677.
(4) 2 Dowl. N. C. 350.

in which an application was made to a judge after he had gone to another assize town, and was held too late. In *Grace* v. *Clinch* (1), which is a decision on the very similar statute, 6 Geo. 4, c. 50, s. 34 (2), the judge verbally granted the application for a certificate at the time, but omitted to sign the certificate on the back of the record till the taxation of costs, and it was held that the statute had not been complied with; and *Leech* v. *Lamb* (3) is a similar case on the same statute. The case of *Christie* v. *Richardson* (4) shews that the construction of the two statutes must be the same.

Then as to the rule for a new trial. The Court very rarely grants a new trial on account of the insufficiency of the damages in actions of tort. The case of *Armytage* v. *Haley* (5), relied on by the other side, is an extreme case, very different from the present one. There appears to be no case of slander or libel in which a new trial has been granted on such a ground. In *Hayward* v. *Newton* (6), which was an action for slander, a rule for a new trial for insufficiency of damages was expressly refused, on the ground that there was no precedent for it. In *Rendall* v. *Hayward* (7), which was a similar action, Tindal, C.J., said: "The court never grants a new trial because the damages are low, unless there has been some mistake in a point of law on the part of the judge who presided, or in the calculation of figures by the jury;" and the same is laid down in Archbold's Practice, p. 1525, 12th ed. The cases were fully discussed in *Kelly* v. *Sherlock* (8), which gives the present state of the law. The present case does not come within any of the exceptions to the rule that a new trial will not be granted in actions of slander or libel on the ground of the insufficiency of the damages.

De Rutzen (*Giffard, Q.C.*, with him) supported the rule for a new trial, and shewed cause against the rule to set aside the certificate. First, with respect to the certificate. The case of *Thompson*

(1) 4 Q. B. 606.

(2) 6 Geo. 4, c. 50, s. 34:—"The person or party who shall apply for a special jury shall pay the fees . . . and all the expenses occasioned by the trial of the cause by the same, . . . unless the judge before whom the cause is tried shall, immediately after the verdict, certify" upon the record, &c.

(3) 11 Ex. 437; 25 L. J. (Ex.) 17.

(4) 10 M. & W. 688.

(5) 4 Q. B. 917.

(6) 2 Str. 940.

(7) 5 Bing. (N.C.) 424.

(8) Law Rep. 1 Q. B. 686.

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v. *Gibson* (1) is an authority in the plaintiffs' favour. There Lord Abinger interprets the words of the statute to mean (2), "within such reasonable time as will exclude the danger of intervening facts operating upon the mind of the judge so as to disturb the impression made upon it by the evidence in the cause." In the present case the judge said, when granting the certificate, that he had been thinking about the matter ever since the trial. It was granted, therefore, as a result of the impression received at the trial. The fact that the application by counsel was not made immediately cannot affect the question, as no application by counsel at all is necessary, but the judge may certify of his own accord: *Thompson* v. *Gibson*. (1) In *Grace* v. *Clinch* (3) the certificate was not signed till the costs were being taxed, and the position of the parties was altered; and so also in *Leech* v. *Lamb* (4), many months elapsed before the signature; and it is the signature which, in the act under which those cases were decided, gives the right to the costs in question. Then as to a new trial. The damages were most unreasonable if the woman was innocent. The slander was a most grievous one. The rule laid down in Archbold's Practice and *Rendall* v. *Hayward* (5) has been relaxed in modern times: Lush's Practice, p. 635, 3rd ed.

WILLES, J. We are to dispose of two rules—one of them obtained by the plaintiffs for a new trial on the ground of the insufficiency of the damages, and the other obtained by the defendant to set aside a certificate granted by the judge who tried the cause, under 3 & 4 Vict. c. 24, s. 2, that the slander was wilful and malicious. It appears that the defendant spoke of Mrs. Forsdike words imputing to her adultery, and it must be taken that at the trial it was amply established that the slander was spoken, and was untrue in fact, the defendant having mistaken another woman whom he saw for Mrs. Forsdike. That seems the only way of reconciling the facts and the verdict. The jury, thinking Mrs. Forsdike had been untruly accused, gave her the verdict, and at the same time, thinking that the defendant had bonâ fide seen a woman at the

(1) 8 M. & W. 281.
(2) 8 M. & W. at p. 287.
(3) 4 Q. B. 606.
(4) 11 Ex. 437; 25 L. J. (Ex.) 17.
(5) 5 Bing. N. C. 424.

time he said, and mistaken her for Mrs. Forsdike, let him off with small damages. The jury do not appear to have misconducted themselves; there does not appear to have been any compromise among them leading to a verdict clearly inadequate; in a case of slander a jury considers not only what the plaintiff should receive, but what the defendant should pay.

Such being the circumstances of the verdict, no certificate for costs was applied for at the time: such an application is not necessary, but it is usual, in order to remind the judge of his power, and to induce him to use it. The judge did not announce his intention to consider the matter so as to fix the defendant with notice, and nothing passed till ten days afterwards, when, at another town, the application for a certificate was made, and it was granted. There was nothing to prevent the judge certifying at the time, or an application being made to him with that view. If such circumstances had existed, it might have been said that whenever an opportunity first occurred of making the application, or of the judge certifying, that was within "a reasonable" time; but no such question arises here, and, putting the widest construction on the words "immediately afterwards," it would be contrary to fact to say that the certificate was so granted in this case. The rule to set aside the certificate must, therefore, be made absolute. Then with respect to the new trial, there is no misconduct of the jury—no misdirection by the judge. The only ground for the application is the necessity of vindicating the character of Mrs. Forsdike; but we think that has been completely accomplished, although the certificate of the judge cannot be sustained. The object of the action, therefore, has been completely attained, and, as we could not grant a new trial without payment of costs, we should confer no benefit on the plaintiffs by making the rule absolute. The rule for a new trial must, therefore, be discharged.

BYLES, J. I am of the same opinion. It is difficult to define accurately the words "immediately afterwards:" all I shall say is, that I agree with my Brother Willes. One thing is clear, that it must be before the lapse of time and intervening business has lessened the effect on the mind of the judge of what took place at the trial, which rule is applicable to all the cases that have been

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cited. That has here been certainly transgressed; there intervened several days of business at the place where the case was tried, and several elsewhere; and if this certificate was in time, I do not see what could be held to be too late.

As to the other point, the jury may reasonably have taken into account what the defendant ought to pay as well as what the plaintiffs ought to receive. Moreover, I have heard no authority for granting a new trial on the ground that the damages are insufficient in an action of slander, and the case of *Rendall* v. *Hayward* (1) is distinctly in point to the contrary. There Tindal, C.J., says that the Court never grants a new trial because the damages are low unless there has been some mistake in point of law on the part of the judge who presided, or in the calculation of figures by the jury. And this has been transcribed into books of practice, which still lay it down so. The rule for a new trial, therefore, must be discharged.

Rule absolute to set aside the certificate, and rule for a new trial discharged.

Attorney for plaintiffs: *C. M. Stretton.*

Attorney for defendant: *Eyre & Co., for R. B. Jones, Llanelly.*

July 4.

THE METROPOLITAN BOARD OF WORKS *v.* THE METROPOLITAN RAILWAY COMPANY.

Sewers—Easement—Right to lateral support—Metropolitan Board of Works— 11 *&* 12 *Vict. c.* 112—18 *&* 19 *Vict. c.* 120—*Metropolitan Railway Company* —17 *&* 18 *Vict. c. ccxxi.*

A sewer made by the Metropolitan Commissioners of Sewers under the powers vested in them by 11 & 12 Vict. c. 112, was transferred to the Metropolitan Board of Works by 18 & 19 Vict. c. 120:—

Held, by Bovill, C.J., and Byles, J. (Montague Smith, J., dissenting), that these Acts gave the board no right to any lateral support for the sewer by the land of the adjacent owners.

SPECIAL case.

This action was brought to recover two several sums of 18,000*l.* and 3,065*l.* 13*s.* 4*d.*, the former being the amount awarded by Mr.

(1) 5 Bing. N. C. 424.

Hawkshaw, as umpire, under the Lands Clauses Consolidation Act, 1845, as the amount of compensation to which the plaintiffs were entitled in respect of the Fleet sewer having been injuriously affected by the execution of the works of the defendants, the latter being the costs of the reference and award. The following case was stated by order at Nisi Prius for the opinion of the Court.

The plaintiffs are the Metropolitan Board of Works, created and incorporated by the Metropolis Local Management Act, 1855 (18 & 19 Vict. c. 120). The sewer in question is the Fleet sewer, and it is one of the main sewers of the metropolis vested in the plaintiffs by the same Act. The Fleet sewer was in parts originally an adaptation of the old Fleet river. That part of it which is material to the present case, was constructed in 1856 by the Metropolitan Commissioners of Sewers, in consequence of the formation of the new street, then made in continuation of Farringdon Street called Victoria Street. This new sewer was a diversion of the Fleet sewer from its old course; it was a circular brick sewer, 1330 feet in length or thereabouts, 10 feet in diameter in the clear, with 14-inch work all round. This part of the sewer was constructed properly throughout, of suitable materials, and it was constructed according to the mode then usually adopted of constructing sewers of that character. It remained in a sound and efficient condition down to the time of the accident hereinafter mentioned.

The defendants are the Metropolitan Railway Company, who were originally incorporated by the Metropolitan Railway Act, 1854 (17 & 18 Vict. c. ccxxi). By that Act they were authorized to construct among other works a railway in a cutting or covered way, part of which was from Charlotte Street in the parish of St. Pancras, to the east side of Victoria Street before mentioned, parallel to the line of the sewer. For the purpose of constructing this portion of their railway the defendants caused a deep cutting and excavation to be made for a distance of 566 yards. This cutting and excavation runs parallel or nearly parallel to the course of the new sewer. The level of the bottom of this railway cutting was about 16 feet below the invert or bottom of the sewer. The distance from the brickwork of the sewer to the back of the railway wall built in the tunnel or cutting, was about 15 feet. As the earth or soil was

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excavated from the cutting the sides of the cutting were carefully strutted and supported for the purpose of preventing any slipping or yielding of the adjacent soil, and as soon as was practicable a strong retaining wall was built on each side of the cutting for the same purpose. The excavation and the building of this wall proceeded simultaneously, but there always was an interval of a few feet between the end of the cutting and the extremity of the wall, which interval was strutted and supported as mentioned above. The whole of the work was done properly and with suitable materials, and was constructed according to the usual and approved method of making and constructing similar works. The whole of these works were executed by the defendants upon lands which they had duly acquired under the provisions of their acts of parliament.

The works of the cutting, with the strutting and supporting mentioned above, would have been sufficient for the support of the adjacent soil in its natural and undisturbed position, and but for the sewer no accident would have happened, but they were not sufficient to support the sewer without damage. Some subsidence or yielding took place, by which the works of the sewer were cracked or otherwise damaged. The fluid contents of the sewer leaked or escaped through these cracks, and undermined the retaining walls of the railway cutting, and finally, while the railway works were still proceeding, the walls of the railway, which had just been erected between Ray Street and Vine Street, subsided bodily into the excavation of the railway for a length of 122 feet, and the sewer at the same time burst and flooded the railway works to a depth of about seven feet. It is admitted by the defendants that their works damaged the plaintiffs' sewer, and that the amount of such damage is the sum found and awarded by Mr. Hawkshaw.

The plaintiffs at once took the necessary steps to reconstruct the sewer, and its reconstruction was completed in January, 1863. Application was then made by the plaintiffs to the defendants to reimburse them the amount expended in reconstructing the sewer, and the defendants refusing to pay or acknowledge their liability, the plaintiffs took the necessary steps for having the amount of the compensation to which they claim to be entitled

determined by arbitration, under the 68th section of the Lands Clauses Consolidation Act, 1845. The umpire, Mr. John Hawkshaw, made the award on the 15th of June, 1866, and thereby awarded the sum of 18,000*l.* as the amount of the damage caused by the execution of the works of the defendants. The costs of the reference were afterwards taxed at 3065*l.* 13*s.* 4*d.*, and payment of these two sums was refused by the plaintiffs, and the present action was afterwards brought to recover them. The defendants contend that they are not liable to make any compensation to the plaintiffs for the damage to the sewer, on the ground that the sewer was not injuriously affected by the execution of the works of the defendants within the meaning of the 68th section of the Lands Clauses Consolidation Act, 1845; the sewer being a new one, and the plaintiffs having no right to any lateral support for the sewer by the land of the adjacent owners.

Before the defendants commenced the execution of their excavations and other works in the neighbourhood of the sewer as mentioned above, they gave the plaintiffs a proper ten days notice, in writing, of their intention to execute such works, accompanied by a plan and section shewing the course, depth, and inclinations and other necessary particulars thereof, and obtained from the plaintiffs their approval of such plan and section, in accordance with s. 104 of the defendants' act (1), and the excavation and other works were subsequently executed by the defendants in accordance with this plan and section.

The question for the opinion of the Court was, whether the plaintiffs were entitled to compensation for the injury done to the Fleet sewer by the defendants under the circumstances stated in the case. (2)

(1) 17 & 18 Vict. c. ccxxi. post 618.

(2) The following, amongst other sections of acts of parliament bearing upon the question in dispute, were set out in the case:—

11 & 12 Vict. c. 112, s. 7. . . . Vests in the Metropolitan Commissioners of Sewers, with certain exceptions, all sewers within the limits of their commission.

Section 38: — The commissioners shall repair the sewers, so vested in them, "and shall cause to be made such sewers and works, or such diversions or alterations of sewers and works as may be necessary for effectually draining the area within the limits of the commission, and shall cause any banks or defences abutting on any river, stream, canal, or watercourse to be raised, strengthened, or altered, where it may be necessary so to do, for effec-

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Sir J. B. Karslake, A. G. (*Raymond* with him), for the plaintiffs. The plaintiffs claim compensation on the ground that the defendants have interfered with their right to lateral support of their sewer. The defendants deny the existence of such right, and

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tually draining or protecting from floods or inundation such area; and it shall be lawful for the commissioners to carry any such sewers through, across, or under any turnpike road, or any street or place laid out as or intended for a street, or through or under any cellar or vault which may be under the pavement or carriageway of any street, and (if upon the report of the surveyor it should appear to be necessary) into, through, or under any lands whatsoever, making compensation for any damage done thereby as hereinafter provided; and it shall be lawful for the commissioners from time to time to enlarge, contract, raise, lower, arch over, or otherwise improve or alter all or any of the sewers, watercourses, and works which shall be from time to time vested in them or subject to their order and control, and to discontinue, close up, or destroy such of them as they may deem to have become unnecessary."

Section 54:—"That no building shall be erected in, over, or under any sewer vested in the commissioners, without the consent of the commissioners first obtained in writing, and that all vaults and cellars adjoining their sewers shall be substantially made, and so as not to interfere or communicate with any such sewers; and if any building, vault, or cellar be erected or made contrary to the provisions herein contained, the commissioners may demolish or fill up the same, and the expenses incurred thereby shall be paid by the person erecting and building or making such vault or cellar, and shall be recoverable as charges for default; and that any person, not being authorized for that purpose by the commissioners, who shall make any drain or opening into any of their sewers, shall" be liable to a penalty, and such drain may be stopped up or re-made, and any person who shall throw into any sewer of the commissioners any rubbish, &c., shall be liable to a penalty.

Section 66:—Gives the commissioners power "to purchase by agreement any land necessary for the formation or protection of any works which the commissioners are authorised to execute under this act."

Section 67:—The Lands Clauses Consolidation Act, 1845, with certain exceptions, "shall, so far as respects such purchases by the commissioners as aforesaid, be incorporated with this act."

Section 69:—"Full compensation shall be made out of such rates to be levied under this act as the commissioners shall by their decree direct to all persons sustaining any damage by reason of the exercise of any of the powers of this act," the amount to be settled by arbitration, or to be ascertained by justices.

Section 70:—Regulates the procedure upon arbitrations under s. 70. 18 & 19 Vict. c. 120, section 135:—"The sewers mentioned in Schedule (D) to this act" (which include the sewer in question) "being the main sewers now vested in the Commissioners of Sewers of the city of London, and in the Metropolitan Commissioners of Sewers respectively, with the walls, defences, banks," &c., &c., "with all right of way and passage used and enjoyed by such commissioners respectively over and to such sewers, works, and things, and all other rights concerning or incident to such

whether it does exist is the real question in issue. The plaintiffs do not claim to have acquired any such right by purchase or by user, the sewer having been made within the last twenty years; but an examination of the statutes bearing on the question will

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sewers, works, and things, shall be vested in the Metropolitan Board of Works, and such board shall make such sewers and works as they may think necessary for preventing all or any part of the sewage within the metropolis from flowing or passing into the river Thames in or near the metropolis, and . . . . shall also make all such other sewers and works, and such diversions or alterations of any existing sewers or works vested in them under this act, as they may from time to time think necessary for the effectual sewerage and drainage of the metropolis, and shall discontinue, close up, or destroy such sewers for the time being vested in them under this act, as they may deem unnecessary, and such board shall from time to time repair and maintain the sewers so vested in them, or such of them as may not be discontinued, closed up, or destroyed as aforesaid; and for the purposes aforesaid, such board shall have full power and authority to carry any such sewers or works through, across, or under any turnpike road, or any street or place laid out as or intended for a street, as well beyond as within the limits of the metropolis, or through or under any cellar or vault under the carriageway or pavement of any street, and into, through, or under any lands whatsoever within or beyond the said limits, making compensation for any damage done thereby as hereinafter provided, and all sewers and works from time to time made by the said board shall vest in them, and the said board shall cause the sewers vested in them to be constructed, covered, and kept so as not to be a nuisance or injurious to health, and to be properly cleared, cleansed, and emptied, and for the purpose of clearing, cleansing, and emptying the same they may construct and place, either above or under ground, such reservoirs, sluices, engines, and other works as may be necessary, and may cause the sewage and refuse from such sewers to be sold or disposed of as they may see fit, but so as not to create a nuisance, and the money arising thereby shall be applied towards defraying the expenses of such board."

Section 148:—"All property, matters, and things whatsoever vested in the Metropolitan Commissioners of Sewers, except certain sewers, shall be vested in the Metropolitan Board of Works," together with all rights of action, &c. &c.

Section 151:—"For the purpose of enabling the said Metropolitan Board, ... to obtain any land, or any right or easement in or over any land, which they respectively may require for the purposes of this act, the Lands Clauses Consolidation Act, 1845," with certain exceptions, "shall be incorporated with this act; and the provisions of the said act so incorporated with this act, which would be applicable in the case of a purchase of any land, shall be applicable in the case of the purchase of a right or easement in or over any land."

Section 204:—"No building shall be erected in, over, or under any sewer vested in the Metropolitan Board of Works, or in any vestry or district board, without their consent first obtained in writing, and if any building be erected contrary to this provision, the board or vestry in whom such sewer is vested may demolish the same,

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shew that they confer upon the plaintiffs a statutable right equivalent to that which would otherwise have been obtained by a twenty-years' user. The 38th section of 11 & 12 Vict. c. 112, under the authority of which this sewer was made, authorizes and

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and the expenses incurred thereby shall be paid by the person erecting such building."

17 & 18 Vict. c. ccxxi., section 104:—"Nothing in this act contained shall extend or be deemed or construed to extend to enable the said company to execute any work, or any act which may interfere with or affect any sewer, drain, watercourse, weir, dam, bank, pipe, conduit, sink, sluice, penstock, or work within the jurisdiction, or subject to the survey, order, or control of the Metropolitan Commissioners of Sewers, or their successors now made or existing, or hereafter to be made or to exist, without the consent in writing of the said commissioners or their successors first had and obtained, or to prevent the said commissioners or their successors from executing and carrying out any works ordered, or hereafter to be ordered, by them, or either of them as freely, fully, and effectually as if this act had not been passed; and where any work to be done under the powers of this act shall or may pass under, over, or near to, or in such a direction or manner as to interfere with any such sewer, drain, watercourse, weir, dam, bank, pipe, conduit, sink, sluice, penstock, or work, the said company shall not commence such work until they shall have given to the Metropolitan Commissioners of Sewers, or their successors, ten days' previous notice in writing of their intention to execute such work, accompanied by a plan and section shewing the course, depth, inclinations, and other necessary particulars thereon, and until the said commissioners, or their successors, shall have signified their approval of the same, unless the said commissioners do not signify their approval, disapproval, or other directions within ten days after service of the said notice, plan, and sections upon the secretary of the said commissioners or their principal clerk for the time being; and the said company shall comply with and conform to the orders, directions, and regulations of the said commissioners and their successors in the execution of the said works, and where, by reason of the execution of any works, or the doing of any acts by the said company, it shall become necessary to alter, divert, reconstruct, or otherwise interfere with the works of or under or subject to the said commissioners or their successors, the said company shall execute at their own costs and expense all such works as shall become necessary thereby, subject to the control, superintendence, and direction of the said commissioners and their successors, and shall save harmless and keep indemnified the said commissioners and their successors against any expenses consequent upon any such alteration, diversion, reconstruction, interference; and all new altered or substituted works shall be as fully and effectually under the control of the said commissioners and their successors as any other works under their control, and nothing in this act shall extend to prejudice, diminish, alter, or take away any of the rights, powers, or authorities vested or to be vested in the said commissioners or their successors, but that all such rights, powers, and authorities shall be as good, valid, and effectual as if this act had not been passed."

requires the then Commissioners of Sewers to make all necessary sewers, and it therefore by implication conferred upon them all the rights which were necessary for that purpose, and all their rights were transferred to the plaintiffs by 18 & 19 Vict. c. 120, s. 135. In the case of *Caledonian Railway Company* v. *Sprot* (1) it was held that a grant of land for the purpose of making a railway necessarily carried with it by implication a grant of a right to the support of the railway, and similarly the statute in requiring the commissioners to make the sewer, impliedly granted a right to the necessary support of it. This easement might no doubt have been obtained by purchase, as well as the ground through which the sewer passed; but it has been decided that the Board of Works are not bound to purchase any land, but may make the sewer without purchasing the rights of owners which they interfere with, if they make compensation for the infringement of those rights: *North London Railway Company* v. *Metropolitan Board of Works* (2); and the same construction must apply in the case of easements: they need not purchase them, but must make compensation, if required. The adjoining owners here might have claimed compensation under ss. 69 & 70 of 11 & 12 Vict. c. 112, for this easement on their lands of lateral support, which the Board acquired by the making of the sewer; it is true they did not do so, but the fact that no compensation has been claimed or paid will not prevent the right having been acquired by the Board: *In re Pettiward and the Metropolitan Board of Works.* (3) That the act contemplated some restrictions being imposed on the adjoining landowners appears from s. 54 of 11 & 12 Vict. c. 112. The parliamentary powers conferred on the defendants will not affect the question, for whatever rights the plaintiffs possessed are expressly reserved to them by the defendants' act (17 & 18 Vict. c. ccxxi.), s. 104, though other provisions for their protection are added.

Coleridge, Q.C. (*Quain, Q.C.*, and *Horace Lloyd* with him), for the defendants. The right to support, which is claimed by the plaintiffs, if really given to them by the statute, is only given to them by implication. It may be admitted that all that is really *necessary* for the construction of the sewer must be implied from the section

(1) 2 Macq. 449. 2 Jur. N.S. 421 (3) 19 C. P. (N.S.) 489; 34 L. J. (C.P.) 301. 11 Jur. N.S. 932.
(2) John. 405; 28 L. J. (Ch.) 909. 5 Jur. N.S. 1127

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which imposes on the plaintiffs the duty of making it. But the fallacy of the argument for the plaintiffs is in the supposing that the right now claimed by them is necessary. The sewer might have been so constructed as not to need lateral support; it might have been constructed as an open dyke, instead of below ground, or the walls been made thicker.

[MONTAGUE SMITH, J. Must it not be assumed that the legislature intended the sewer to be made in the ordinary and proper way?]

What was a proper way of constructing it would depend on the rights of adjoining owners. The way actually adopted may have been one which was proper if they bought a right to lateral support, as they had power to do, and not otherwise. The right claimed was not necessary to the construction of the sewer, and cannot, therefore, be implied from the act. This view is confirmed by s. 54 of 11 & 12 Vict. c. 112, which would have included a prohibition to excavate within such a distance as to take away the support required, if the act had really intended to deprive adjacent owners of their right to do so, or indeed the whole section might, on the plaintiffs' view, have been omitted as superfluous.

The defendants' act, no doubt, reserves the rights of the plaintiffs by s. 104, and the other provisions of that section would not therefore take away the right now claimed, if it really existed; but they would then be wholly unnecessary, and their presence, therefore, is strong evidence that the plaintiffs have no such right. At any rate, this section provides an express remedy for the breach of the right now claimed, if it exist, viz., the rebuilding of the sewer by the defendants, and the plaintiffs, therefore, have proceeded in the wrong way in seeking compensation under the Lands Clauses Consolidation Act, instead of calling on the defendants to rebuild the sewer.

Sir J. B. Karslake, in reply. The 104th section of the defendants' act contains several provisions for the plaintiffs' protection, but these are cumulative, and do not affect the remedies the plaintiffs would have otherwise possessed for a breach of their rights. The provision at the end of the section for the rebuilding of the sewer does not apply to the case of an accident such as the present,

but to cases where the defendants' plans necessitate their interfering with the sewer. The plaintiffs have, it is clear, a right to buy land or easements, but they are not obliged to do so, nor can the landowners compel it; they can, if they like, pay compensation instead, and are not obliged, as railway and other companies, to give any notice to the landowners of their intention to take the land. The right to purchase is given to them for the benefit of the public, not of the landowners. This appears from the case of *North London Railway Company* v. *Metropolitan Board of Works* (1), already referred to. If the defendants' contention be correct, the plaintiffs, whenever they make a sewer, will have to purchase easements of all the adjoining owners. There would be no special difficulty in ascertaining the amount of compensation due to the landowner, if the plaintiff's view be right; for in any case, the landowners are entitled to compensation for the restrictions imposed on them by s. 54, and that would give rise to a similar inquiry.

Cur. adv. vult.

BOVILL, C.J. This case was argued before my Brothers Byles and Montague Smith, and myself. My Brother Byles concurs in the judgment which I am about to deliver; but my Brother Montague Smith dissents from our view.

The sewer in this case was vested in the Metropolitan Board of Works, and the railway company had no power to interfere with or to do anything which might affect it, without the consent of the board, and were bound to execute the works as the board might direct. (2) The plans and sections of the proposed railway were submitted to and approved by the board, who gave their consent in writing for the execution of the works; and the same were executed by the defendants, in accordance with the plans which had been so approved, upon lands purchased by them under the powers of their acts of parliament. The whole of the works, which were in a deep cutting, were done efficiently and properly, with proper materials, and according to the usual methods; and they were sufficient for the support of the adjoining soil in its natural

(1) John. 405; 28 L. J. (Ch.) 909.

(2) Metropolitan Railway Act, 1854 (17 & 18 Vict. c. ccxxi), s. 104.

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and undisturbed position, but were not sufficient to support the sewer.

In consequence of the excavation by the railway company, and the weight and pressure of the sewer, the walls of the railway gave way, the sewer burst, and the board were put to considerable loss and expense in repairing it.

The plaintiffs contend that they had a right to the support of the adjoining land for their sewer; and that, this support having been removed by the defendants, and damage thereby caused to the sewer, they are entitled to compensation under the Lands Clauses and Railways Clauses Consolidation Acts, 1845 (1), for the injury thus occasioned. Whether the plaintiffs are so entitled must depend upon whether they had a legal right to the support of the adjoining land; for, if they had no such right, then the board could not but for the act have maintained an action against the defendants or any other persons for excavating their own ground adjoining the public road, and would not under the act be in a position to maintain the present action, which is and must be founded upon a legal right and an injury to it.

It is not contended that the board have acquired any right to the support of the adjoining land by length of user, by purchase, or grant, or by express enactment; but they contend that such a right is necessary for their works, and that it is impliedly given by the provisions of their acts of parliament.

The board possess very extensive powers to make and execute works and to purchase lands and easements for these purposes; or they may execute their works without purchasing such lands or easements, making compensation to the parties injuriously affected, as was decided by Vice-Chancellor Wood, in the case of the North London Railway (2): and, where additional protection or support is required, they have also power to acquire lands or easements, in order to secure it. (3) They may, if they think fit, construct new works in such a manner as to require no additional support from the adjoining lands; and, in the case of this railway company, they had also the most ample powers of protection, inasmuch as no

(1) 8 & 9 Vict. cc. 18, 20.

(2) *North London Railway Company* v. *Metropolitan Board of Works*, John. 405; 28 L. J. (Ch.) 909.

(3) See 18 & 19 Vict. c. 120, ss. 135, 150, 151; and 11 & 12 Vict. c. 112, ss. 38, 66.

works which might affect the sewer could be executed without their previous consent. Under these circumstances, it can scarcely be said that a right to support from adjoining lands, whether of the railway company or private owners, was absolutely necessary for their works, or that it must necessarily be implied in cases where the board do not think fit to acquire it by purchase: and, considering that, if this alleged right is to prevail, the effect would be to impose a serious burthen upon, and to affect materially the value and enjoyment of, all private property adjacent to the sewers, we ought to see very clearly that it was the intention of the legislature to impose such a restriction upon the rights of the owners of private property, before coming to a conclusion that it is so imposed.

There is certainly no express enactment, nor, as it seems to us, any necessary inference or implication, to that effect, from any of the provisions of these acts of parliament. The board may, if they think fit, construct their sewer without requiring any lateral support from the lands of adjacent owners. Those owners, in most cases, would have no means of knowing or judging of the mode in which the works of the board had been constructed, or whether they required any or what degree of support; and they would not, therefore, know to what extent, if any, their rights were interfered with or affected by such works: and no such owner could safely excavate his land for any ordinary building, except at the risk of having to pay serious damages if the sewer should happen to give way.

It was contended for the plaintiffs, that the mere construction of the sewer would give the owners of adjacent lands a right of compensation for the servitude imposed upon their lands under ss. 69 and 70 of the Sewers Act (1); but we cannot adopt such a construction of the act.

In the case of the railway company, they would not only be in a similar position to that of ordinary owners, but, by the 104th section of their act, the works of the railway are subject altogether to the control of the board; and neither as against private owners of adjacent lands, nor as against the railway company, is any such right to support for the sewer, in our opinion, given to the board.

(1) 11 & 12 Vict. c. 112.

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In the case of railways, where it is intended to prevent the working of minerals in adjacent lands, there is an express enactment to that effect. (1) And the special enactment in s. 54 of the Sewers Act (2), as to vaults and cellars, seems to shew that the right of an owner of land to excavate for and construct such vaults and cellars, would not without such special provision have been, and was not intended to be, affected.

When the board require protection or support for their sewers, they have ample powers to purchase or acquire it; and, when they have not exercised those powers, it seems to us that they do not acquire any such right as is contended for over the lands of adjoining owners, and that by the mere construction of a sewer they do not deprive such owners of adjacent property of their right of excavating it, or subject their lands to the servitude of affording support to the sewer. The railway company were deprived of the rights of ordinary landowners by the very stringent provisions of the 104th section of the special act (3); but that clause does not give the board such a right to support as is essential to the maintenance of this action; and, when the works have been executed with the consent and approval of the board, as they were in this case, we are unable to discover any valid ground upon which the board are entitled to maintain an action of the present description.

Whether they have any remedy against the railway company under the latter part of the 104th section, it is not necessary to determine; nor is it material to the present question. This action is founded upon an alleged legal right of the plaintiffs having been injuriously affected; and as, in our opinion, such legal right is not made out, we think the defendants are entitled to the judgment of the Court.

MONTAGUE SMITH, J. In this case, in which I have the misfortune to differ from my Lord and my Brother Byles, the fact is clear, that a main sewer of the board has sustained damage by the execution of the works of the railway company in the course of excavations made by the company in land about fifteen feet from

(1) 8 & 9 Vict. c. 20, s. 78. (2) 11 & 12 Vict. c. 112.
(3) 17 & 18 Vict. c. ccxxi.

the sewer. The extent of the damage, as found by the arbitrator, is 18,000*l.* The point to be determined is, the liability of the railway company to make compensation for the damage; and it is one of considerable importance and difficulty.

The main question argued before us was, whether the board were entitled to such right of lateral support for the sewer from the adjacent land as would have enabled them to have maintained an action against the defendants (the railway company) for the damage caused by their works, supposing those works had not been constructed under the authority of an act of parliament. It was conceded by the board, that, according to the authorities,—see *Caledonian Railway Company* v. *Ogilvy* (1),—the sewer would not have been "injuriously affected," within the meaning of the Lands Clauses Consolidation Act, so as to entitle them to compensation from the railway company, unless the right of action referred to would have existed.

The contention of the defendants is found in par. 26 of the case; and the ground of non-liability is there stated, viz. that, "the sewer being a new one, the plaintiffs had no right to any lateral support for the sewer by the land of the adjacent owner."

The sewer is undoubtedly a new one, in the sense that it had not been built so long as twenty years before the time of the damage done; and it undoubtedly had put additional weight upon the ground on which it rests. No right, therefore, to an easement of lateral support for this additional weight had been acquired by length of enjoyment. The right of the board must, consequently, rest on other foundations; and it is to be found, if at all, in the statutes under which the authority to make the sewer was conferred.

The Metropolitan Commissioners of Sewers (whose rights and liabilities are transferred to the plaintiffs) were by the 11 & 12 Vict. c. 112, s. 38, impowered to make such sewers and works as might be necessary for draining the area within their commission, and to carry the sewers *into, through, or under any lands whatsoever*, making compensation for any damage done thereby. The act does not in express terms give any rights of support; and the question is whether the statute which confers on the commissioners, acting

(1) 2 Macq. 229.

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for the public benefit, the right to build the sewers in any land, gives at the same, by necessary implication, the right of support upon the subjacent and adjacent land for the sewers so authorized to be built.

If a grant is made of land for the purpose of building a railway or a house upon it, such grant carries with it by implication the right of reasonable and necessary support for the railway or house from the subjacent and adjacent lands of the grantor. This was so held by the House of Lords in *Caledonian Railway Company* v. *Sprot.* (1) In that case the respondent had conveyed land to the company expressly for the purpose of being used as a railway; and, although he had reserved all minerals, and liberty to work them, it was held that there was an implied grant of a right of support for the railway, and that the respondent was not entitled to work the minerals so as to endanger the railway. The Lord Chancellor in that case says (2): "The effect of the conveyance was to convey the land to be covered by the railway to the company, together with a right to all reasonable subjacent and adjacent support; a right to such support being a right necessarily connected with the subject-matter of the grant." And see also the judgment of Willes, J., in *Bonomi* v. *Backhouse.* (3) The same principle of construction which enabled the Court to imply a grant of support in such a conveyance, appears to me to be properly applicable to cases where an express statutable right is given to construct a thing requiring support on land; and consequently, that, where such a right to construct is expressly conferred by a statute, the same necessary implication of a right of support for the thing constructed must be made. It is clear that the legislature which had power to authorize the commissioners to enter on any lands, and construct sewers in them, had power to confer the right of support; and the question is, whether it must not be taken to have done so. Now, it must have been known to parliament, that these sewers could neither be made, nor stand, without the support of the subjacent and adjacent lands. They could not, however built, be self-supporting: and it seems to me to follow as a necessary presumption, that, in giving the right to make the sewers, it must have been intended to give a right of

(1) 2 Macq. 449. 2 Jur. N.S. 623. (2) 2 Macq. at p. 450. 2 Jur. N.S. 6
(3) E. B. & E. 622, 654. 5 Jur. N.S. 1345

support; unless, indeed, it can be collected from the act that it was the intention of parliament that the commissioners should purchase the lands or easements in them before commencing their works. But the legislature does not seem to me to have contemplated such purchases, but to have provided otherwise than by purchase for the protection of land-owners, by enacting that "full compensation" shall be made to all persons sustaining damage by reason of the exercise of the powers intrusted to the board, to be settled by arbitration: 11 & 12 Vict. c. 112, s. 69.

It is clear, upon the construction of the act, and upon authority, that the making compensation is not a condition precedent to the accrual of the right to make the sewer. This was so held in the case of *Pettiward* v. *Metropolitan Board of Works* (1), where Willes, J., says: "I think it is perfectly well established that the meaning is, that the making of the compensation should not be a condition precedent, but should be an obligation."

It was, however, strongly argued by the learned counsel for the defendants as the foundation of his case, that parliament intended that the board should in all cases purchase the land or the easements of support: and, if he had established that proposition, I should have agreed that there was no necessary implication that a right of support was granted. But it seems to me obvious from the whole tenor of the statutes that it was not intended that, as a rule, the commissioners should purchase the lands through which and near which the sewers were to be made. By the statute under which this sewer was made,—11 & 12 Vict. c. 112, ss. 66, 67,—no powers were even given to the commissioners to purchase lands compulsorily; but power only to purchase by agreement, where the commissioners saw fit to do so. This seems conclusive to shew that the making of compensation for the damage done to the lands, and not the purchase of the soil through or near which the sewers were to pass, was in the contemplation of the legislature.

This was the view of the act taken by Vice-Chancellor Wood in *North London Railway Company* v. *Metropolitan Board of Works* (2), where he held that the powers to purchase lands and easements were not restrictive of the powers to enter on lands and to con-

(1) 19 C. B. (N.S.) 489, 503; 34 L. J. (C.P.) 301, 305. 11 Jur. N.S. 932, 933.
(2) 1 John. 405; 28 L. J. (Ch.) 909. 5 Jur. N.S. 1121.

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struct sewers, making compensation; but an additional power given to the commissioners, to be exercised by them in certain cases at their own discretion, and according to the view of what in any particular case was best to be done: and he refused to grant an injunction to restrain the defendants from making a sewer through the plaintiffs' lands, which they did not propose to purchase.

The last act, 18 & 19 Vict. c. 120, no doubt, gives power to the board compulsorily to purchase lands and easements; but the exercise of this power is placed under restrictions, and the sewer in question was not made under the provisions of that act.

It is clear, that, unless a right of support for the sewer was conferred, together with the right of making it, the board must have bought all the subjacent and adjacent lands, or easements in them, *before* they commenced their works; for, if no right of support is conferred, any subjacent owners might undermine the sewer, and any adjacent owner might dig beside it, and so let it down at the very instant it was built. The 54th section of the act would give insufficient protection, for that is pointed only against certain specific acts, such as building "in, over, or under the sewers." This clause seems to me to assume that there is a right of support; and certainly the prohibition of certain specific things is not inconsistent with the existence of such a right.

I should have expected much more to have been expressly prohibited, if it had not been assumed by the legislature that a general right to support would exist.

The right to compensation provided by the legislature ought to be so construed as to give full protection to land-owners. Such compensation, as appears from the case of *Pettiward* v. *Metropolitan Board of Works* (1), may be claimed at any subsequent time, and when the damage caused by the burden of support thrown on the land becomes apparent.

On the whole, therefore, it seems to me that a right of support was by necessary implication conferred by the legislature, together with the express right to make the sewer "into, through, or under any lands."

A point arose in the argument, as to the effect of the 104th

(1) 19 C. B. (N.S.) 489; 34 L. J. (C.P.) 301.

section of the railway company's act, 17 & 18 Vict. c. ccxxi. It is not stated in the case that this point was relied on by the defendants; but it was put forward, in the argument before us, that, supposing a right of support to have existed as against other landowners, the claim to compensation as against the railway company did not arise, by reason of the provisions of the 104th clause. It was answered, on the part of the plaintiffs, that this clause was intended to give additional protection to the board, and that it did not destroy or take away any rights belonging to them; and, further, that such rights were expressly reserved by the saving at the end of the clause.

I have not been without doubt whether the remedy of the board should not have been taken under the latter part of this clause, which provides that the company shall reinstate the works of the board, if they are interfered with by the works of the railway company. The answer given by the plaintiffs' counsel was, that the clause had reference to direct interference with the works of the board, and not to damage caused as the damage in question was caused; and that, in any event, the remedy was cumulative, and not restrictive. I have, after some doubt, come to the conclusion that the right to compensation as now claimed is not taken away by this clause.

Again, it was rather suggested by the defendants than relied on as a distinct point, that the approval of the plans for the railway works by the board, was equivalent to a licence to execute them: but this cannot, I think, be so. The approval is not a voluntary licence by the board, but a condition imposed on the railway company. It would be the duty of the board not to refuse their approval of the plans, if at the time they appeared to afford sufficient security to their own works: but such approval so given in compliance with the act does not, as it seems to me, carry with it the consequence of a voluntary licence, so that, if any damage is done to the works of the board in the execution of the plans, the railway company is absolved from making compensation. The right to compensation does not assume any tort on the part of the railway company: on the contrary, the claim for compensation under the Lands Clauses Consolidation Act assumes that the company are lawfully doing the acts causing the damage

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under legislative powers. It is on this ground that notice of action is not necessary: *Delany* v. *Metropolitan Board of Works.* (1)

No doubt, in order to determine whether lands are injuriously affected, it is necessary to ascertain whether the claimant has sustained damage which would have been an actionable injury if it had been done without legislative sanction. This is done to ascertain that there is a right in the claimant, and not to shew that a wrong is committed by the company.

Having come to the conclusion that a right to the support of their sewer from the adjacent lands was vested in the board, and consequently that the damage done to the sewer by the operations of the defendants on such adjacent lands would have given a cause of action if they had no legislative sanction for them, I think the right to compensation arises, and that it is not taken away by the 104th clause, or the acts done in pursuance of it. In my opinion, therefore, the plaintiffs are entitled to judgment.

Judgment for the defendants.

Attorney for plaintiffs: *W. Wyke Smith.*
Attorneys for defendants: *Burchells.*

July 4.

XENOS *v.* FOX.

Marine Insurance—Collision Clause—Suing and Labouring Clause—Cost of Defending an Action—Liability of Underwriters.

4 C.P.D. 372 — 377

A Lloyd's policy in the usual form on the plaintiff's vessel was made, "subject to the running down clause as per slip attached." By that clause the assurers agreed that if the plaintiff became liable to pay and paid *as damages* for running down any other ship any sum not exceeding the value of the vessel insured, they would repay to the plaintiff a certain proportion of such sum. The vessel insured having run down another, and the plaintiff having successfully defended an action brought against him in respect of the injury:—

Held, that he was not entitled to recover any portion of the costs of the defence, either under the suing and labouring clause, or the running down clause.

Affd in Ex Ch 4 C.P. 665

THIS was an action to recover from the underwriters, upon a policy of insurance on a ship, the *Smyrna*, either under the suing and labouring clause, or as money paid, a proportionate part of the ex-

(1) Law Rep. 2 C. P. 532; in error, ante p. 111.

penses incurred by the assured in defending an action brought against him for injury caused by the *Smyrna* to another ship, the *Mars*, by coming into collision with it.

The case was tried before Bovill, C.J., at the sittings in London after last Hilary Term, when the following facts were proved.

The policy on which the action was brought, was an ordinary Lloyd's policy for 6000*l.*, on the ship *Smyrna*, valued at 8400*l.*, for 12 months, from the 1st day of November, 1860, and was expressed to be made subject to the running down clause, as per slip attached. The slip was in the following words :—

"And we the assurers do further covenant and agree, that in case the said vessel shall by accident or negligence of the master or crew, run down or damage any other ship or vessel, and the assured shall thereby become liable to pay and shall pay as damages any sum or sums not exceeding the value of the said vessel *Smyrna*, s.s. and her freight by or in pursuance of any judgment of any court of law or equity given in any suit or action defended with our previous consent in writing, we the assurers shall and will bear and pay such proportion of three-fourth parts of the sum so paid as aforesaid as the sum of 6000*l.* hereby assured bears to the value of the said vessel *Smyrna* and her freight."

During the time covered by the policy a collision occurred between the *Smyrna* and another ship, the *Mars*, in consequence of which the latter vessel sunk. Proceedings were thereupon taken by the owners of the *Mars*, in her Majesty's consular court of Galatz, which were at first directed against the *Smyrna* itself, but its owners, the Greek and Oriental Steam Navigation Company, having undertaken the defence of the action, the proceedings against the vessel ceased. Judgment having been given in the court at Galatz, in favour of the owners of the *Smyrna*, the owners of the *Mars* appealed to the consular court at Constantinople, and the judgment having been affirmed they appealed to the Privy Council, by whom the judgment below was again affirmed. The present action was brought by the plaintiff, who was the agent in Great Britain of the Greek and Oriental Steam Navigation Company, to recover from the underwriters a proportionate part of the costs of defending the action and appeals.

Upon these facts the plaintiff was nonsuited, on the ground that

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his claim fell neither within the suing and labouring clause nor within the running down clause. The learned judge also ruled that it was immaterial whether the defendants had or had not given their assent in writing to the defence of the action and appeals; no evidence therefore of such authority was given. The plaintiff had leave to move to enter the verdict for a sum to be agreed upon by the parties, if upon the above facts he was entitled to do so.

Sir G. Honyman having obtained a rule accordingly, or for a new trial, if the Court should be of opinion that the written or oral consent of the defendant to the defence was material,

J. Brown, Q.C., and *J. C. Mathew*, shewed cause. The suing and labouring clause has no application to such a case as the present. The assured may sue, labour, and travel for the defence of the said goods, merchandizes, and ship, &c. The word "&c." evidently refers to the body, apparel, and other terms used in the former part of the policy, and cannot include such a matter as the present costs. Moreover, the clause begins "in case of any loss or misfortune" which evidently refers to the losses or misfortunes caused by the perils that have just been enumerated, and not to any others. It was decided in England by the case of *De Vaux* v. *Salvador* (1) that injury from collision is not included amongst those, and the American cases collected in 2 Parsons on Maritime Law, pp. 226—229, shew that this is so whether the collision is occasioned by negligence or not. The collision clause was introduced in consequence of those decisions, and is said in Arnould on Insurance, 3rd ed. p. 238, to vary in different policies. The clause in the present case clearly would not in itself include such a claim as the present, being expressly confined to damages paid in pursuance of a judgment in a court of law or equity. And the introduction of the collision clause cannot increase the effect of the suing and labouring clause, indeed it rather disproves the interpretation of the suing and labouring clause contended for by the plaintiff, according to which the plaintiff could recover, if at all, the whole costs, even though exceeding the amount of the original insurance: *Le Cheminant* v. *Pearson* (2); *Stewart* v. *Steele* (3);

(1) 4 A. & E. 420. (2) 4 Taunt. 367.
(3) 5 Scott's N. R. 927.

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2 Phillips on Insurance, 3rd ed. s. 1743; and that without any consent of the defendant.

Sir G. Honyman, and *Watkin Williams*, in support of the rule. It must be considered, for the purpose of this argument, that the defendant gave the consent required by the collision clause. The policy consists of three parts: the insurance of the ship against the ordinary perils of the sea; an insurance in certain cases against the risks of collision; and the suing and labouring clause. It is upon the latter that the plaintiff relies. Insurance is only an agreement to indemnify, and the subject matter of the policy is not strictly the ship, but the loss of it, to which the insured is exposed. The loss arising from collision is an additional subject matter of insurance, which is incorporated with the policy by the words "subject to the running down clause as per slip attached," and to which, equally with the other losses to be indemnified by the underwriters, the suing and labouring clause applies. The words of a policy must not be pressed too literally, because they are not altered even when, to some extent, inapplicable to the matter in question; thus the words ship, &c., are always held to mean the thing insured, whatever that may be: *Paterson* v. *Harris* (1); *Wilson* v. *Jones* (2); *The Bold Buccleugh*. (3) The object of the suing and labouring clause is, that when there is danger of a loss occurring which would fall upon the underwriters, it may be the interest of the assured to endeavour to avert it: *Kidston* v. *Empire Marine Insurance Company*. (4) It need not be suing and labouring with respect to the ship or goods, if it is to avert a loss which is the subject of the policy: *Great Indian Peninsula Railway Company* v. *Saunders*. (5) The very object of incurring the costs now sought to be recovered was to prevent the plaintiff being obliged to pay damages for the collision which the defendant would have had ultimately to pay, and came strictly, therefore, within the principle of the suing and labouring clause. It is not any difficulty that the costs may exceed the proportion of the value of the ship and freight to which the amount to be paid

(1) 1 B. & S. 336; 30 L. J. (Q.B.) 354.
(2) Law Rep. 2 Ex. 139.
(3) 7 Moo. P. C. 267.
(4) Law Rep. 1 C. P. 535.
(5) 1 B. & S. 41; 30 L. J. (Q.B.) 218.

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under the collision clause is confined, because there is no doubt that the assured may recover under the suing and labouring clause more than the amount insured by the policy. The plaintiff, however, in this case would only be entitled to recover a proportion of the costs actually paid, because, as the underwriters would have only had to pay part of the damages if the cause had not been defended, the costs were incurred partly for the plaintiff's benefit, and not incurred for the benefit of the underwriters only, and the costs must be shared under the suing and labouring clause in the same proportion as the loss which they averted would have been. It is not necessary to shew that the plaintiff would have had to pay damages if the action had not been defended; it is enough that there was peril of a loss, it need not be shewn that the loss did occur or would have certainly done so but for the plaintiff's exertions. The plaintiff is also entitled to recover under the count for money paid, the defence having been conducted for the benefit of the defendant, and as must be assumed for the purposes of this argument, with his authority.

Cur. adv. vult.

July 4. The judgment of the Court (Bovill, C.J., Byles and Montague Smith, JJ.) was delivered by

BOVILL, C.J. This was an action against the defendant as one of the underwriters upon a policy effected at Lloyd's by the plaintiff on his vessel the *Smyrna*, and was brought to recover a proportion of the law expenses incurred by the plaintiff as the owner of the *Smyrna* in successfully defending a collision suit instituted by the owner of a vessel called the *Mars*, in which the *Smyrna* was charged with negligence in running down and sinking the *Mars*.

The plaintiff sought to maintain his claim under the suing and labouring clause contained in the policy, contending that it must be read in connection with the collision clause attached to the policy, and that, upon the true construction of the whole policy, he was entitled to maintain the action. We have to determine what is the true meaning and construction of this policy.

The policy itself is in the ordinary printed form of a Lloyd's policy, and is an insurance for 6000*l.* on the hull and machinery

of the *Smyrna*, valued at 8400*l.*; and in the first part of the policy it is stated to be an insurance for twelve calendar months, "subject to the running down clause, as per slip attached." The slip is in the following words:—[The Chief Justice here read the running down clause.]

This running-down clause is therefore added to and becomes part of the instrument; and, for the purposes of the present motion, it is to be assumed that the action at the suit of the *Mars* was defended by the plaintiff, as owner of the *Smyrna*, with the consent in writing of the underwriters.

It has been long settled that an ordinary policy does not cover the liability for damage done to another vessel by the negligence of those in charge of the vessel insured; and such a case would not come within the ordinary perils insured against, or within the usual suing and labouring clause in an ordinary policy. A collision clause in various forms has therefore for many years been in use where parties desire to be protected against the consequences of a collision arising from the fault of their own vessel. It is in each case a special contract very different from the contract of insurance in its ordinary form; and the liability under it does not depend upon the ordinary perils covered by the policy, but upon the special matters mentioned in the clause itself.

The collision clause which was added in this case is of a very special and limited character. It commences with express and independent words of agreement, and appears to be a clause complete in itself, defining very accurately the nature, extent, and conditions of the liability which the underwriters undertake. In order to bring a case within that clause, there must be a suit or an arbitration; the underwriters must have consented in writing to its being defended; the assured must be liable to pay damages; and there must have been a recovery of such damages by the judgment of a court of law or equity or the award of an arbitrator: and, when these conditions have been observed, and the plaintiff has recovered against the assured, and he has paid the sum so recovered as damages, not exceeding the value of the ship and her freight, the underwriters undertake to pay the assured such a proportion of three fourths of the sum so paid as the 6000*l.* assured by the policy bears to the value of the ship and freight. So that,

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in this case, taking the value of the ship to be the sum stated in the policy, viz. 8400*l.*, and assuming the freight to amount to 2000*l.*, if the owners of the *Mars* had recovered damages to the value of the *Smyrna* and her freight, viz. 10,400*l.*, three fourths of which would be 7800*l.*, the underwriters would have been liable, under this collision clause, to the owner of the *Smyrna* for such proportion only of this sum of 7800*l.* as 6000*l.* bears to 10,400*l.*, or $\frac{15}{20}$ths, which would be equal to 4500*l.*, being little more than half of the sum that would have been recovered against him as damages.

It is somewhat doubtful, looking to the limitation of the damages in this slip to the value of the ship and freight, whether the clause was intended to cover any part of the costs that might be recovered by the plaintiff in the collision suit: but, assume for the moment that the word "damages" in the collision clause would include the costs of the plaintiff in such a suit, then, in the event of the assured vessel having sunk another ship and her cargo of a value equal to or greater than the value of the assured vessel and her freight, and of a judgment being recovered against the owner of the latter vessel to that extent, it is clear, according to the terms of the collision clause, that the underwriters would not only not be liable for more than $\frac{15}{20}$ths of the damages so recovered, but would not be liable for any part of the costs recovered by the plaintiff against the owner of the assured vessel. It is equally clear that the terms of the collision clause do not contain any engagement whatever to pay any part of the costs incurred by the owner of the assured vessel in his defence, whether the suit be successful or unsuccessful.

It was contended, however, by the plaintiff, that, although the collision clause did not apply to or include the costs incurred by him in defending the collision suit, yet that, under the suing and labouring clause in the policy itself, where there was a collision clause attached to and forming part of the policy, he would be entitled to recover such costs of the defence.

It seems to us, however, that the collision clause contains the whole agreement, and defines the extent of the liability which the underwriters undertake in the case of damage to another vessel by collision: and, if this were not so, and the suing and labouring

clause could be considered as applying to the case of the assured's costs of his defence, he would be entitled to recover those costs, or a part of them, whether the suit was properly or improperly brought or defended, and whether the defence of the suit was successful or unsuccessful; which seems entirely contrary to the spirit and meaning of the collision clause. The plaintiff would also be entitled to recover a proportion of the costs totally different from that in which the underwriter engaged to be responsible for the damages; for, in cases within the suing and labouring clause, each underwriter engages to contribute "according to the rate and quantity of his sum assured herein," which is a very different proportion to that mentioned in the collision clause.

The collision clause throughout refers and seems to apply only to cases where the assured vessel was liable for damages, and had been made so liable by a judgment or award; whereas, the plaintiff in this action seeks to recover costs in a case where his vessel was not liable for the collision, and had not been made liable by any judgment, and where, on the contrary, he had successfully resisted the suit, because his vessel was not in fault.

Looking to the entire policy, it seems to us that we ought not to place upon the whole of it, including the suing and labouring clause, a construction so much more extensive than, and so entirely different from, the very special terms of the collision clause itself, or to hold that it applies to the costs of the defence in this case.

The suing and labouring clause has a well-known meaning and application, and in terms and in substance applies to cases of the perils insured against by the ordinary form of policy: but it seems to us to have no application or reference to the collision clause, and to apply only to such "losses and misfortunes" as are previously mentioned in the policy, viz. the ordinary insurance perils: and we think that it does not include the costs of an action wrongfully brought against the assured for a collision for which he was not liable. The collision clause is not an insurance against the perils mentioned in the policy, but is an engagement of a very restricted character, extremely limited in extent, and subject to very precise conditions, to pay a proportion of a part of something that the assured may be liable and compelled to pay to the owner

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of another vessel, in a suit defended with the underwriters' written consent. We think that this clause does not introduce a new subject-matter of insurance to be affected by the usual perils, but is in the nature of an additional clause, as much as the suing and labouring clause itself.

We cannot give to the suing and labouring clause in this policy with the slip attached such a construction as the plaintiff contends for: and we think that the engagement and liability of the underwriters in the case of damage done to another vessel by collision, are contained in and defined by the collision clause itself, and that this clause contains the whole agreement of the parties on the subject to which it relates.

A claim was made to recover these costs as money paid to the use of the underwriters: but that must equally depend upon the construction of the policy, as it is not pretended that there was any ground other than the policy upon which the defendant could be made liable for these costs.

Upon the whole, we are of opinion that neither under the collision clause, nor under the suing and labouring clause, nor upon the true construction of the whole of the policy taken together, is the plaintiff entitled to recover. We think, therefore, that the defendant is entitled to our judgment, and that the rule to set aside the nonsuit must be discharged.

Rule discharged.

Attorneys for plaintiff: *Thomas & Hollams.*
Attorneys for defendant: *Waltons & Bubb.*

DICKENSON AND OTHERS *v.* JARDINE AND OTHERS.

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May 25.

Marine Insurance—Jettison—General Average—Liability of Underwriters—Custom.

A. insured goods at Canton by a policy which included jettison among the perils insured against. The goods were jettisoned under circumstances which entitled A. to a general average contribution from the owners of the ship and of the rest of the cargo, which arrived safely at London, the port of discharge. A. having sued the underwriters for the whole amount insured, without having first collected the contributions to which he was entitled from the other owners of the ship and cargo:—

Held, that he was entitled to recover; and that the underwriters having paid him would be then entitled to stand in his place with respect to the general average contribution.

Held also, that the liability of the underwriters under the policy could not be varied by a custom, alleged to exist in the port of London between merchants and underwriters, to hold the latter liable only for the share of the loss cast upon the owner of jettisoned goods in the general average statement.

SPECIAL case stated for the opinion of the Court, without pleadings.

In August, 1864, the plaintiffs shipped 641 packages of tea on board the ship *Canute*, to be carried from Foochow to London. The goods were insured with the defendants for 3987*l.* 10*s.* by a valued voyage policy in the usual form, the goods being valued at the sum insured, and jettisons being included among the perils insured against.

The *Canute* sailed from Foochow with the tea and other goods on board, and in the course of her voyage she struck on a reef. A portion of the cargo, consisting of 607 out of the 641 above-mentioned packages of tea, was properly thrown overboard to lighten her. Subsequently she got off the reef, and reached London safely with the rest of the cargo. The insurable value of these 607 packages was 3776*l.* 6*s.* The net value of the jettisoned tea, had it arrived safely at its destination, would have been 3305*l.* 0*s.* 2*d.*, being a sum less than the insured value.

The loss of the tea so jettisoned constituted a general average loss, giving to the plaintiffs a right to contribution from the various owners of the other interests at risk in the usual way to the amount of the above sum, 3305*l.* 0*s.* 2*d.*, of which the plaintiffs themselves had to contribute the sum of 995*l.* 12*s.* 2*d.*, being their proportion

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of the whole general average by the vessel. The defendants paid to the plaintiffs the sum of 995*l.* 12*s.* 2*d.*, and the plaintiffs brought this action to recover 2780*l.* 13*s.* 10*d.*, the difference between that sum and the sum for which the goods jettisoned were insured. There are certain cases in which goods are thrown overboard, but not for the safety of the whole adventure; and in such cases, although they do not give rise to general average contribution, the goods, nevertheless, are said to be jettisoned.

It was contended, on behalf of the defendants, that it was an established custom between merchants and underwriters in the business of marine insurance in London, that under a policy of insurance covering loss by jettison, in case the insured goods were lost by jettison under such circumstances as to constitute a general average loss as between the owners of such goods and the owners of the other interests at risk, the underwriters were liable under the policy only in respect of such share or proportion of the loss as was cast upon the owner of the jettisoned goods in the general average statement.

The evidence adduced in support of this contention was given at length in the case.

The questions for the Court were: 1st. Whether the plaintiffs were entitled to recover in the action the whole of the insurable value of the cargo jettisoned? 2ndly. If the Court should be of opinion in the negative, then whether the plaintiffs were entitled to recover anything more than their general average proportion calculated upon the net arrived value of the goods?

Sir G. Honyman, Q.C., for the plaintiffs. The plaintiffs are entitled to recover the full value of the goods which they insured, independently of the question of any rights they may have against third parties; the defendants, when they have paid, will stand in the plaintiffs' place in respect of such rights. If the plaintiffs had issued their writ the day after the loss of the goods, the defendants would have had no defence, as the rights of general average contribution do not arise till the ship arrives at her port of destination, and the liability of the defendants can hardly have ceased from the mere fact of a right of action against third parties having subsequently arisen. The custom relied on by the defendants was

not proved, and if it had been so, it would have been inadmissible as contradicting the policy, and would have been invalid on the ground of unreasonableness, and would have had no application to this policy, which was made at Canton, while the custom is confined to the port of London.

Watkin Williams, for the defendants. The principal question is, whether the defendants are bound to pay the plaintiffs at once the whole value of the goods insured, or only to indemnify them for what they contribute by way of general average, leaving them to recover the remainder of the loss from the other parties who are liable to contribute by way of general average. In a word, the question is, whether the loss is a total loss, or a loss of a different kind? whether, if a bale of goods worth 1000*l.* be thrown overboard, under circumstances which entitle the owner to be repaid 900*l.*, it is a total loss?

[WILLES, J. The right to be repaid in part only arises if the ship or cargo arrives safely.]

If they do not, but are themselves lost, the loss of the goods jettisoned becomes total, but not before. As a matter of common sense, would a merchant write off the value of the bale as totally lost?

[WILLES, J. If a pirate had boarded the vessel, and thrown the goods overboard, the plaintiffs would have had a right of action against him for the value; or if the master had thrown them overboard wrongfully, the plaintiffs could have sued the shipowner; but would the loss in either case not have been total?]

It cannot be denied that it would. There are, however, some authorities for the view that the loss is not total in such a case as the present. The principal one is Roccus on Insurance, n. 62, who, though he does not state the amount for which the underwriters would be liable, whether to make good the value insured, or only the value upon which the general average would be calculated, yet certainly does not treat the loss as a total loss. In Marshall on Insurance, 4th ed., p. 434, it is said that the assured should proceed first against the parties who are liable to contribute by way of general average, and only sue the underwriters for the residue. There is a case in the American reports, *Lapsley* v. *Pleasants* (1), in which the same rule was laid down, though there are also cases to the contrary.

(1) 4 Binn. 502.

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[BOVILL, C.J. That case is referred to in Phillips on Insurance, vol. ii., p. 122, and the author adds a note citing Emerigon, c. 12, s. 44, Pothier on Insurance, c. 52, that the claim may be first made against the underwriters.]

The amount recovered under the average loss is sometimes greater and sometimes less than the insurable value. In the former case would not the assured be entitled to recover the larger amount?

[WILLES, J. He would, but it would be upon a different claim, viz. for indemnification for his loss from having to pay the general average contribution, which is quite distinct from the claim for indemnification for the loss of the goods themselves, and arises only on the ship or other goods reaching the port of destination safely.]

BOVILL, C.J. I am of opinion that the plaintiffs are entitled to recover the whole of the amount claimed by them.

I think the rule is correctly stated in Phillips on Insurance, 3rd ed., vol. 2, s. 1348, as follows: "It is not a condition that the assured on goods must claim contribution of the other parties for a jettison before he can demand indemnity from his underwriters. He may demand it of them in the first instance." There seems to have been a decision in the courts of Pennsylvania, *Lapsley* v. *Pleasants* (1), to the contrary effect; but there had been an earlier decision in the Court of New York, *Maggrath* v. *Church* (2), in which the underwriters had been held liable for the whole amount insured, and in a later case in the Circuit Court of the United States, *Potter* v. *Providence Washington Insurance Company* (3), Story, J., delivering the judgment of the court, after citing both cases, followed the earlier decision, and laid down the law in the same way as Mr. Phillips has done. Pothier's Traité du contrat d'Assurance, s. 52, is to the like effect. In this case the goods were insured against jettison, amongst other risks, and the goods were jettisoned, and I think the plaintiffs are entitled, therefore, to recover the sum insured. It is true that there is a remedy against the owners of the ship and the remainder of the cargo, if they ultimately arrive safely at their destination, for part of the loss. But this does not affect the plaintiffs' right against the underwriters, who will then be entitled

(1) 4 Binn. 502. (2) 1 Caines, 196. (3) 4 Mason, 298.

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to stand in their place, and recover contributions from the other parties who are liable. A further question has been raised, whether the underwriters are not released by a custom alleged to exist at the port of London, but this custom was not made out, and if it had been so, would not have availed the defendants, being unreasonable and contrary to the express agreement of the parties, as was the custom set up in the case of *Grissell* v. *Bristowe*. (1)

WILLES, J. I am of the same opinion. Mr. Williams argued the case in the only way which was possible when he said that a case of jettison under the circumstances here detailed did not constitute a total loss of the goods, because in point of law the loss was less than total, by the value of the right which accrued to have compensation for part of the loss from the shipowner and the other owners of cargo. It was so in one sense, because if the vessel or any part of the cargo arrived safely in consequence of the jettison, the owners must contribute to the loss sustained by the owners of the goods so sacrificed for the general advantage; but the goods were totally lost at the time, though their owner had a contingent right to recover from certain persons a portion of their value. The result is that the owner has two remedies—one for the whole value of the goods against the underwriters, the other for a contribution in case the vessel arrives safely in port; and he may avail himself of which he pleases, though he cannot retain the proceeds of both, so as to be repaid the value of his loss twice over. This is the usual case where there is an insurance, and a loss following therefrom, within its terms, which would be total but for the liability of a third person. It has been so settled since the case of *Randal* v. *Cockran* (2): in that case a vessel had been taken by the Spaniards, and the underwriters had paid as for a total loss. Reprisals having been made, the commissioners who were appointed to indemnify those who had sustained losses refused to entertain a claim made by the underwriters, but the assured having obtained from them a contribution over again towards their loss, the underwriters filed a bill, and it was held, not that the loss was not total, but that the underwriters having indemnified the assured, whatever the assured received from the

(1) Law Rep. 3 C. P. 112, 4 C. 36 (2) 1 Ves. Sen. 98.

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commissioners must be held by them as trustees for the underwriters. If the assured proceeds against the underwriters in the first instance, the latter cannot avail themselves by way of plea of the fact that the assured has a distinct right against some other person. They must pay the amount claimed in the first instance, and will then be entitled to use the name of the assured, and proceed against the other parties who are liable, as explained by Lord Wensleydale in *Quebec Fire Insurance Company* v. *St. Louis.* (1) Questions of this kind have arisen in many forms, and always have been decided the same way; thus, in *Yates* v. *Whyte* (2), the defendant who was liable for a loss that had been paid by the underwriters, insisted that the underwriters having already indemnified the plaintiff the claim against him was satisfied, but the plaintiff was held entitled to recover for the benefit of the underwriters. With respect to the alleged custom, it was not proved, the evidence at most shewing only a practice adopted in undisputed cases; and, moreover, the loss being one springing directly from the contract of insurance, could not be affected by such a usage, if proved.

MONTAGUE SMITH, J. I am of the same opinion. I think the goods jettisoned were totally lost to the assured within the terms of the policy, and that the underwriters are therefore liable to pay for the value of the goods. It is said that the loss is not total, because there are other parties who are bound to contribute to the loss, and the plaintiffs are therefore already partially indemnified: that in one sense is so, but the assured have made a contract with the underwriters that they shall be paid the sum insured in certain events which have happened, and they are entitled to look to that contract for their indemnification independently of their other rights. Both upon principles of law and the weight of authority, we have a right to treat this as a total loss.

Judgment for the plaintiffs.

Attorneys for plaintiffs: *Thomas & Hollams.*
Attorneys for defendants: *Freshfields.*

(1) 7 Moo. P. C. 286, 316.

(2) 4 Bing. N. C. 272.

MOUNT *v.* TAYLOR.

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May 21.

Costs—County Court Act, 1867 (30 & 31 *Vict. c.* 142), *ss.* 5, 6—*Statute of Gloucester* (6 *Edw.* 1, *c.* 1).

The Statute of Gloucester (6 Edw. 1, c. 1) gives to the plaintiff in an action a right to recover his costs if he obtain any damages. By various County Court Acts, and, in particular, 13 & 14 Vict. c. 61, s. 11, and 15 & 16 Vict. c. 54, s. 4, it was provided that the plaintiff should not recover his costs in certain cases, except under certain circumstances therein named. By the County Court Act, 1867 (30 & 31 Vict. c. 142), s. 33, all the provisions of previous County Court Acts with respect to costs are repealed. By s. 5 fresh provisions with respect to costs are enacted as to all actions commenced after the passing of the act. The act received the royal assent on the 20th of August, 1867, but by s. 36 it is provided that it shall come into operation on the 1st of January, 1868. An action of trespass in which questions of title were involved was commenced before the 20th of August, 1867, and a verdict was entered also before that date for the plaintiff, subject to a reference; the award was made after the 1st of January, 1868, and the arbitrator directed the verdict to stand for the plaintiff for 5*l.*: subsequently the plaintiff signed judgment, and obtained a judge's order for costs, and the master thereupon taxed his costs. On a motion to review the master's taxation:—

Held, that the Statute of Gloucester had not been repealed as to the classes of cases in which, under the former County Court Acts, the plaintiff was entitled to his costs on obtaining a judge's order, or fulfilling the other conditions contained in those acts, but had as to those in which the plaintiff could in no way obtain his costs. That the effect of the County Court Act, 1867, was to remove all such conditions in the former classes of cases without imposing any fresh ones as to actions commenced before the passing of that act. And that the plaintiff, therefore, was entitled to his costs under the Statute of Gloucester, independently of the judge's order.

THIS was an application for a rule to review the master's taxation. The action was in trespass, and involved questions of title; it was commenced in the year 1866, and came on for trial on the 7th of August, 1867, when a verdict was entered for the plaintiff, subject to a reference. The arbitrator made his award on the 29th of February, 1868, and by it directed that the verdict for the plaintiff should stand for 5*l.*, but gave no certificate for costs. The plaintiff having signed judgment and taxed his costs, the defendant took out a summons before Willes, J., to set aside the taxation. Willes, J., in order that the matter might be brought fully before the Court, set aside the taxation, and made an order

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allowing the plaintiff his costs, and it was agreed that it should be taken that the costs had been re-taxed upon that order.

Manisty, Q.C., for the defendant. Two questions have to be considered, first, whether Willes, J., had any power to make the order giving the plaintiff his costs; and, secondly, whether, if not, the plaintiff is entitled to his costs without an order under the Statute of Gloucester (6 Edw. 1, c. 1). With respect to the first, the act under which alone a judge or the court has power to grant such a certificate is 15 & 16 Vict. c. 54, s. 4, which repeals the previous provision of 13 & 14 Vict. c. 61, s. 13; but at the time this order was made by Willes, J., that section was itself repealed by 30 & 31 Vict. c. 142, s. 33. There was, therefore, no statutory authority for making the order, and it is one which could clearly not have been made without such authority. With respect to the second question, it is necessary to look at the course of legislation with respect to costs. At common law there was no right to costs, but the Statute of Gloucester (6 Edw. 1, c. 1) gave a right to costs in all cases in which the plaintiff recovered damages, then 9 & 10 Vict. c. 95, and 13 & 14 Vict. c. 61, provided that in actions of contract in which the plaintiff recovered a sum not exceeding 20*l.*, or in actions of tort in which the plaintiff recovered a sum not exceeding 5*l.*, the plaintiff should not be entitled to costs, with a proviso that in certain cases he should be so entitled on obtaining a certificate from a judge or the court. The effect of those provisions was to repeal the Statute of Gloucester as to all actions coming within the sections, giving a fresh statutory right to costs in certain cases upon a judge's order being obtained. Then those provisions having been repealed by the recent County Court Act (30 & 31 Vict. c. 142), s. 33, the plaintiff cannot recover his costs under them, while the Statute of Gloucester is prevented from reviving (as it would have done at common law on the repeal of the repealing statute) by the provisions of Lord Brougham's Act, 13 & 14 Vict. c. 21, s. 5.

Kemplay, for the plaintiff, shewed cause in the first instance. At the time the verdict was given the state of the law was such as would clearly have entitled the plaintiff to his costs, and though a delay took place in consequence of the reference, which prevented

a certificate from the judge being obtained at the time, yet judgment is signed on the verdict of the jury, and Willes, J., had a right to look at the state of the law at the time the verdict was given, and to make an order retrospectively with reference thereto.

[MONTAGUE SMITH, J. The difficulty is, that the power to make the order is given by statute.]

In cases in which by statute an order of the court has to be made within two months of the death of a party, the court has made the order after a longer interval, and ordered it to be entered nunc pro tunc where the delay has been caused by the act of the court. Moreover, by the 6th section of Lord Brougham's Act, 13 & 14 Vict. c. 21, it is provided that the provisions of a repealed act shall remain till those substituted for them by the repealing statute come into force.

[WILLES, J. You might go further, and say that here the delay was caused by the agreement of the parties, as the reference was by consent, and that there was therefore an implied contract between the parties that their rights should not be altered.]

In *Restall* v. *London and South Western Railway Company* (1), it was held that where the verdict had been given in an action before the late act came into operation, the plaintiff was entitled as of right to his costs, and the act did not therefore deprive a judge of the power to make the order. But further, the Statute of Gloucester was not repealed by the County Court Acts, but only certain conditions added, such as the obtaining the certificate of a judge: when the certificate is obtained, the right to costs is under the Statute of Gloucester. In *Butcher* v. *Henderson* (2) the Court of Queen's Bench differed from *Restall* v. *London and South Western Railway Company* (1), relying on *Morgan* v. *Thorne* (3), but the latter is really no authority for the defendant. The Court of Queen's Bench held that the plaintiff not being entitled to costs at the time that the verdict was given, could not become entitled to them by a subsequent alteration of the law; but the time at which the rights of the parties are fixed is really when judgment is signed; and in *Morgan* v. *Thorne* (3), at the time judgment was signed, the plaintiff was remitted to his rights under the Statute of Gloucester,

(1) Law Rep. 3 Ex. 141. (2) Law Rep. 3 Q. B. 335.
(3) 7 M. & W. 400.

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and it was therefore that he was held entitled to costs. In *Charrington* v. *Meatheringam* (1) the plaintiff was held not to be entitled to triple costs, his right to them having been taken away by an act which came into force after verdict, but before judgment was signed. In *Reg.* v. *Inhabitants of Mawgan* (2), it was held that an act when repealed is, in effect, blotted out of the statute book, except as to transactions *which were closed*, and several authorities were quoted in argument to that effect. The case of *Roadknight* v. *Green* (3) is conclusive that the right to costs depends upon the state of the law at the time the judgment is signed.

Manisty, Q.C., in reply. The agreement of the parties was merely to leave to an arbitrator to decide what verdict should be entered, and there is nothing to shew that they intended that no alteration in the law should affect the right to costs. If the defendant's contention be correct, a plaintiff would be entitled to his costs in all cases, however small the damages he might recover, and all the evils which arose under the Statute of Gloucester, and which it was the very object of the County Court Acts to prevent, will be re-introduced. The time when the rights of the parties became fixed is not the question, but whether when the order was made there was any statutable authority to make it. But further, the cases of *Charrington* v. *Meatheringam* (1) and *Reg.* v. *Inhabitants of Mawgan* (2) do not prove that the time of signing judgment is the time when the rights of the parties to costs are to be decided, and *Roadknight* v. *Green* (3) only decided that the court would not allow its own delay to prejudice the rights of the parties. In principle, the case of *Morgan* v. *Thorne* (4) is a decision in the defendant's favour; and in *Butcher* v. *Henderson* (5) the Court of Queen's Bench, in a considered judgment, followed that case, and departed from the judgment in *Restall* v. *London and South Western Railway Company*. (6)

BOVILL, C.J. We have great difficulty in construing these acts of parliament; a difficulty which mainly arises from cases

(1) 2 M. & W. 228
(2) 8 A. & E. 496.
(3) 9 M. & W. 652.
(4) 7 M. & W. 400.
(5) Law Rep. 3 Q. B. 335.
(6) Law Rep. 3 Ex. 141.

like the present not having been contemplated by the legislature. We cannot suppose it was intended to deprive a plaintiff of costs where the plaint could not be brought in the county court. Yet this would be the result if we gave effect to the contention of the defendant. By the Statute of Gloucester the plaintiff is entitled to costs. What, then, takes this right away from him? Various provisions are contained in the County Court Acts, the Small Debts Act of London, and other acts referred to in Schedule C. of the 30 & 31 Vict. c. 142. Some deprive the plaintiff of costs in some cases unless certain conditions are fulfilled; others authorize a judge to deprive him of costs; and many of these are inserted in Schedule C., and are repealed. The question is, does this repeal of the later acts revive the Statute of Gloucester, or is it entirely repealed so as not to come in force again? The old rule of law is laid down by Best, C.J. in *Tattle* v. *Grimwood* (1) in the following terms:—"It is an undoubted rule of law that if an act of parliament which repeals former statutes be repealed by an act which contains nothing in it that manifests the intention of the legislature that the former laws shall continue repealed, the former laws will, by implication, be revived by the repeal of the repealing statute." That being the rule before Lord Brougham's Act, s. 5 of that statute enacts, "that where any act repealing, in whole or in part, any former act is itself repealed, such last repeal shall not revive the act or provisions before repealed, unless words be added reviving such act or provisions," a provision which was enacted to alter the previously existing rule. And then, by section 6, it is provided "that wherever any act shall be made, repealing, in whole or in part, any former act, and substituting some provision or provisions instead of the provision or provisions repealed, such provision or provisions so repealed shall remain in force *until* the substituted provision or provisions shall come into operation by force of the last made act." Mr. Kemplay contended that the case fell within section 6, but this is not so. The last County Court Act came into operation on the 1st of January, 1868, and therefore that section does not apply to this case. But with regard to section 5, it is contended that the County Court Act of 1867 repealed the pre-

(1) 3 Bing. 493, 496.

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vious acts relating to county courts, and that by force of Lord Brougham's Act the Statute of Gloucester was not revived. That brings us to the consideration of whether the Statute of Gloucester was repealed by the previous County Court Acts. No doubt, in some cases it was modified, and therefore, to some extent, and in one sense, it was constructively repealed. But on a careful consideration of the County Court Acts, it seems to me they do not amount to a repeal of the Statute of Gloucester within Lord Brougham's Act. The Statute of Gloucester is the foundation of the plaintiff's right to costs, and the County Court Acts superadd conditions to the plaintiff's right to them in certain cases; and if the operation of those statutes be only to superadd certain conditions, and another statute takes away these conditions, or substitutes other conditions, the original statute, in my opinion, remains in force. With reference to the present case, it is material to observe that by the 9 & 10 Vict. c. 95, s. 58, the County Court was excluded from jurisdiction where the title to corporeal or incorporeal hereditaments is disputed; and in this case the title to a wall came in question, and therefore there was no jurisdiction in the County Court. Then, can it be said that the County Court Acts repealed the Statute of Gloucester in cases where the County Court has no jurisdiction? The question seems to answer itself. Where the jurisdiction is expressly excluded, these statutes have no application; and I think it can only be where the plaint would lie that we could say there was any repeal. Here there was no jurisdiction in the County Court, and therefore the acts relating to those courts did not, in my opinion, repeal the Statute of Gloucester within Lord Brougham's Act, and it is not necessary in that view to consider whether an order for costs be necessary. Again, all the provisions of the County Court Acts shew that if a certificate or order for costs be obtained, the plaintiff is to have the *same* judgment as to costs as he would have had if those acts had not been passed, and which must be under the Statute of Gloucester; therefore that statute was not repealed, and it seems to me that the plaintiff is entitled to costs in the present case.

WILLES, J. I am of the same opinion. Our duty in this case

is to ascertain the intention of the legislature from that which we find laid down in the statutes, and the contention of the defendant is, in effect, that the legislature, while enacting in the 5th section of the County Court Act of last year that in certain cases costs might be obtained by the plaintiff in actions commenced after the passing of the act, must be considered to have meant to take away the right to costs in the case of actions commenced before the passing of this act, though of the same or more meritorious character; in other words, the argument of the defendant is founded on the probability that the legislature was beside itself, and that while it enacted that in future the plaintiff might in such a case as this be entitled to costs, in the same breath it took away all right to have costs on any terms in the case of similar actions commenced before the passing of the act, and at a time therefore when the right to costs existed. That may be the effect of the statute, but we must be sure that we are necessarily driven to such a conclusion before adopting it, and I think we are not.

It appears to me that the act will be found practically to have left the right to costs in the case of actions commenced before its passing unaltered, except as to the mode in which the right is to be investigated, and to have altered that only by substituting an inquiry before the master at the time of taxation for a preliminary inquiry before a judge at chambers. In practice there probably will not even be that difference, because where it is doubtful whether an order would have been obtained under the old system, the master would hold his hands till an order was obtained from a judge for the taxation of costs, and this a judge would make, not under the provisions of 15 & 16 Vict. c. 54, but under the general authority of the Court over its proceedings.

I arrive at this conclusion in the same way as my Lord, but I shall state it in rather a different form. The first legislation on the subject of costs was the Statute of Gloucester; then I pass over the interim statutes till the 9 & 10 Vict., and taking that with 13 & 14 and 15 & 16 Vict., on which the right to costs depended till the County Court Act of 1867, I find this state of things:—certain cases in which no plaint could be entered, these may be divided into two species; first, those in which it appeared on the record that there could be no plaint, and in which a prohi-

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bition would have been granted on reading the record; secondly, those which in their nature were equally out of the jurisdiction of the county courts, but in which that did not appear on the face of the record; as, for instance, the present case where title is in question. These two species of cases fall under the same category, and are treated in 9 & 10 Vict. c. 95, s. 58. Then there was the class of cases in which there was concurrent jurisdiction; cases in which county courts had jurisdiction, and in which there were no latent circumstances which would take away the right, but in which an action might also be brought in the superior courts at the option of the plaintiff, with a perfect right to costs upon proving the concurrent jurisdiction. A third category included cases in which, though there was not concurrent jurisdiction, there was sufficient ground for bringing the action in a superior court; as, for instance, in cases in which though the damages were small, the decision would affect important interests. In this class costs were to be allowed upon proof of the sufficient ground. The fourth category would be of cases not in either of the three former. The effect of the Statute of Gloucester was as to all these cases to give costs. Then the County Court Acts came, and with respect to cases of the first species in the first category, they left the Statute of Gloucester unaltered. With respect to cases of the second species in the first category, the Statute of Gloucester was left unaffected, but with the condition that the plaintiff should have an order of a judge, which was only evidence that the case fell within that category.

Before passing on, let us consider what was the effect of the 30 & 31 Vict. c. 142 on cases within this category, for within the 2nd section of it the present case falls. What an inconsistency there would be in saying that in the first species, in which the want of jurisdiction is patent, the plaintiff's costs are to be taxed, but in the second species, in which the want of jurisdiction is as real but latent, he is in no case to have his costs. One cannot help thinking that that would raise such an inconsistency of the legislature with itself in respect to cases which, when the facts become known, are identical, as calls on us to be astute in putting a construction on the statute which would prevent such an absurdity. As to those cases, therefore, it seems reasonable to hold that the Statute

of Gloucester was not repealed, but only modified by a condition as to evidence.

But I agree with my Lord in going further, for in respect of cases in the second and third category, I think it cannot properly be said that the Statute of Gloucester is repealed. We are advised in our books to study the records of the Court, and though this may not now be so generally useful when there are so many authorities given at length in the reports, yet in this case I think it may be very desirable to do so. If the records of the Court be searched from the passing of the County Court Acts to the present day, it will be found that the costs have always been taxed upon the Statute of Gloucester, and not upon the order of the judge, that order being treated only as evidence of the right. The records, therefore, are not only not inconsistent with the views I have expressed above, but they lead to the inevitable conclusion that the Statute of Gloucester was in force as to all cases in which a judge's order could be obtained under the County Court Acts, and that it was the Statute of Gloucester in such cases which gave the plaintiff his costs, while the County Court Acts rendered the obtaining a judge's order a necessary condition, and it is the statutes imposing this condition only which have been repealed by the act of last year. Does then this view, which seems to give a reasonable construction to the act, and which gives costs to persons who would have had them previously, and from whom the statute has not expressed any intention of taking them away, give rise to any inconvenience. The only one that has been suggested at the bar is, that cases falling within category four, that is to say, not falling within either of the three first categories, will be placed in a fresh position. I answer that there will be no such inconvenience, because as to such cases the Statute of Gloucester was repealed, inasmuch as in such cases the plaintiff could not in any way have obtained his costs; therefore, under the provisions of Lord Brougham's Act the Statute of Gloucester with respect to such cases continues repealed. The rule, therefore, ought not to be granted.

MONTAGUE SMITH, J. I am of the same opinion. The important point of time, I think, was that at which the plaintiff could have obtained judgment, which was in February last. At that

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time there was no act in force rendering a judge's order necessary to entitle the plaintiff to costs, or enabling a judge to make such an order. It is said, however, that the 11th section of the 13 & 14 Vict. c. 61, repealed the Statute of Gloucester, and that Lord Brougham's statute prevented its revival when the Act of Vict. was itself repealed. Assuming Lord Brougham's Act to apply to cases of implied repeal, it brings us back to the question, whether the 13 & 14 Vict. c. 61, did repeal the Statute of Gloucester as regards the class of cases within which the present one falls. I agree with my Lord and my Brother Willes that it did not; but that in certain cases it modified the absolute right to costs given by the Statute of Gloucester, by providing that a judge's order should be required before that statute came into operation. No doubt, the 11th section of 13 & 14 Vict. c. 61, says that if in any action commenced after the passing of this act in any of her Majesty's superior courts of record in covenant, debt, detinue, or assumpsit, not being an action for breach of promise of marriage, the plaintiff shall recover a sum not exceeding 20*l.*; or if in any action commenced after the passing of this act in any of her Majesty's superior courts of record in trespass, trover, or case, not being an action for malicious prosecution, or for libel, or for slander, or for criminal conversation, or for seduction, the plaintiff shall recover a sum not exceeding 5*l.*, the plaintiff shall have judgment to recover such sum only, and no costs. If the section had stopped there, no doubt it would have repealed the Statute of Gloucester as to all cases in which the verdict was under the specified amount; but it goes on to say, "except in the cases hereinafter provided." As to such cases, it seems to me, the operation of the Statute of Gloucester is preserved, with the condition that a judge's order should be obtained, because both by the 13 & 14 Vict. c. 61, s. 13, and 15 & 16 Vict. c. 54, s. 4, it is expressly provided that in such cases the plaintiff shall have the same judgment to recover his costs that he would have had if the County Court Act had not been passed. It is plain, therefore, that by the express words of the statute, when a judge's order had been obtained the judgment for costs was on the Statute of Gloucester, which shews that as to such cases that statute was not repealed, but only modified by the annexation of a condition. Then

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the County Court Acts being repealed, the Statute of Gloucester is left in its integrity as to the class of cases in which the present is included, and for the reasons given, Lord Brougham's Act has no operation upon the question. It is said that the case of *Butcher* v. *Henderson* (1), in the Queen's Bench, is opposed to our present decision; but that is not really so. In the case the right to the costs occurred before 30 & 31 Vict. c. 142, came into operation, and Blackburn, J., in delivering the judgment of the Court, says that the circumstances determining the right to costs having been complete at a time when they could not be obtained without an order, the change of the law ought not to put the plaintiff in any better position. Here, I think, the plaintiff's right to costs did not accrue till after the late repealing act had come into operation, and when, therefore, he was entitled to costs under the Statute of Gloucester, unaffected by the provisions of the repealed County Court Acts.

Rule discharged.

Attorney for plaintiff: *H. T. Nater.*
Attorneys for defendant: *Ridsdale & Craddock.*

ROSS *v.* ADCOCK.

July 4.

Ecclesiastical Dilapidations—Waste—Injury to Glebe.

The right of a rector to recover from the representatives of his predecessor, damages for waste, is confined to the case of dilapidations to houses and buildings, and does not extend to waste committed by digging gravel in the glebe.

DECLARATION against the defendant, as administrator of James Adcock, deceased, for that James Adcock, in his lifetime and at the time of his decease, was rector of the parish of Gretham, Lincolnshire, and was, in right of his rectory, seised in fee of the chancel of the parish church, and of certain glebe lands thereto belonging; that James Adcock died on the 11th of May, 1863, whereby the rectory became vacant; that the plaintiff was afterwards in due form of law, presented, admitted, instituted, and inducted to the

(1) Law Rep. 3 Q. B. 335.

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rectory, and thereby became, and still was, rector of the parish, and became and still continued seised in right thereof, of the chancel of the parish church and of the glebe lands, and was the next successor of James Adcock to the rectory and premises, and to the glebe lands.

Averments: That before the death of James Adcock, divers large quantities of the gravel, earth, and soil of the glebe lands, had been and were wrongfully dug up, removed, and carried away, and remained unrestored and unreplaced at the death of James Adcock, and that before the death of James Adcock, divers pits and holes had been and were wrongfully dug, excavated, and made in and upon the said glebe lands, and the soil for cultivation thereby wrongfully removed, and at the death of James Adcock the pits and holes remained unfilled up, and the soil unrestored and unreplaced; and that before the death of James Adcock, wilful waste had been and was wrongfully committed in, on, and to the glebe lands; and the same at the death of James Adcock remained and were thereby wasted, deteriorated, and spoiled. Similar averments, but alleging the same to have been done by James Adcock while he was rector. Similar averments, but alleging that the same were suffered and permitted by James Adcock, while he was rector. That the damages and the expenses necessary to restore and reinstate the glebe lands were 160*l.* 8*s.* 9*d.*, of which the defendant after the plaintiff was inducted, had notice, and was requested by the plaintiff to pay the same, and reasonable time had elapsed, and yet the defendant had not paid the same.

Pleas: 1. Denial that the lands were glebe lands. 2. Denial that the glebe lands were wasted, deteriorated, spoiled, dilapidated, or out of repair, as alleged. 3. Payment before action. Issue thereon.

The cause was tried before Pigott, B., at the Lincoln summer assizes, 1867, when it was proved that by an inclosure award made in the year 1795, a piece of land was allotted to the surveyors of the highways for the time being from which to get gravel for the repair of the highways. The piece of ground so allotted was an acre and a half in extent, and adjoined the glebe, and through a mistake with respect to the boundaries, the surveyors of highways had for more than fifty years dug gravel outside the limits of the

land allotted to them, in land which formed part of the glebe. This had continued during five successive incumbencies, and was not discovered till the plaintiff became rector. The whole value of the gravel so dug from the glebe was 160*l.* 8*s.* 9*d.*, of which 60*l.* had been dug during the incumbency of James Adcock, the last rector, to whom the defendant was administrator, and the remainder during the previous incumbencies. On these facts a verdict was entered for the plaintiff for 160*l.* 8*s.* 9*d.*, with leave to the defendant to move to enter the verdict or to reduce the damages to 60*l.*, on the grounds, 1. That no action lay under the circumstances of this case. 2. That the plaintiff was not the proper person to bring such action. 3. That the defendant was not liable beyond the incumbency of the intestate. 4. That no waste had been committed. 5. That no legal damage had been sustained.

Field, Q.C., having obtained a rule accordingly, and also for a new trial unless the plaintiff would consent to reduce the verdict to nominal damages,

May 5. *Hayes, Serjt.*, and *Cave*, shewed cause. This action is similar to the ordinary action by a rector against the representative of his predecessor for dilapidations, except that the injury is to the glebe instead of to the rectory buildings. The acts complained of are waste for which an ordinary tenant for life would be liable, and though the previous rector did not know of their commission he could and should have known of it. The last case on the subject is *Huntley* v. *Russell* (1), and that also had reference to the digging of gravel. In that case it was held that so much of the gravel as had been dug under a magistrate's order, had been lawfully taken, and that for that no action would lie; but that an action would lie for the part of the gravel which had been sold to private persons, the taking of which was not protected by the order. In the present case there is no pretence for saying that the digging of the gravel was lawful; and that case is a conclusive authority in the plaintiff's favour, at least as to 60*l.* It proceeded on old authorities, which are all quoted in *Wise* v. *Metcalfe* (2), and amongst them the *Bishop of Salisbury's Case* (3),

(1) 13 Q.B. 572; 18 L.J. (Q.B.) 239. (2) 10 B. & C. 299.
(3) Godb. 259.

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which shews that the same rule is applicable to waste and dilapidation, and Degge's Parson's Counsellor, c. 8, p. 89, which is to the same effect. The fact that the gravel pit was open when the last rector came into possession does not affect the question, for the pit had never been lawfully worked, and therefore its continuance was unlawful, *Bartlett* v. *Phillips* (1): and moreover, a gravel-pit is not a mine, *Mansfield* v. *Crawford* (2): and does not therefore come within the rule laid down in Coke Litt., 54 b, that working an open mine is not waste. It has been expressly held in *Holden* v. *Weekes* (3), that a patron though he can restrain a rector from committing waste, is not entitled to an account, and therefore no one would be entitled to recover damages for the injury done to the estate if the succeeding rector were not entitled to do so.

Then with respect to the waste committed during the incumbencies previous to that of Mr. Adcock. It is laid down in Burn's Eccl. Law, vol. ii. p. 154, and Conset's Practice of the Eccl. Courts, 3rd ed. p. 362, that such damages may be recovered: *Bunbury* v. *Hewson* (4), and *Bird* v. *Relph* (5), are authorities to that effect. The former also shews that a rector in possession cannot sue the representatives of any but the last rector.

Field, Q.C., and *Wills*, in support of the rule. This action is founded on the custom of England, but that is really confined to the case of dilapidations to houses and buildings, and is not applicable to other kinds of waste. It is true that a rector cannot legally open mines, or cut down trees, or commit other waste on the glebe, but the remedy is by prohibition either in the Queen's Bench or in Chancery, or by proceedings in the Ecclesiastical courts, and it is not the subject of an action such as the present. The object of an action on the custom of England, is to obtain money to reinstate the buildings, and 14 Eliz. c. 11, s. 18, obliges the money recovered to be spent in the repair of the dilapidations, but other kinds of waste it would be impossible to reinstate, and the rector obtaining damages for them might use them for his own purposes. The case of *Jones* v. *Hill* (6), is said by Lord Denman

(1) 4 De G. & J. 414.
(2) 9 Ir. Eq. 271.
(3) 1 J. & H. 278; 30 L. J. (Ch.) 35.
(4) 3 Ex. 558; 18 L. J. (Ex.) 258.
(5) 2 A. & E. 773.
(6) 3 Lev. 268.

in *Mason* v. *Lambert* (1), to have been the first case in which this form of action was decided to be maintainable, and the declaration there concludes with a claim not for a fixed amount of damages, but for such a sum of money as shall be sufficient to repair; and the same form is adopted in subsequent cases.

[Bovill, C.J. In *Jones* v. *Hill* (2) earlier records of the Court are referred to.]

In Lutwyche are to be found three several precedents of declarations for dilapidations, which shew the true limit of the action at common law, viz. in the cases of *Reynolds* v. *Hewett* (3), *Salkard* v. *Beckwith* (4), and *Kingford* v. *Lloyd.* (5) In each of these the duty to repair is confined to domos, edificia, and structuras. The two latter cases are referred to in *Radcliffe* v. *D'Oyly* (6), where a prebendal house was brought within the principle. Buller, J., there says (7):—"The two cases cited from Lutwyche are very material; for precedents, which have prevailed for a century past, are strong to shew what the common law is; and in those it is stated that prebendaries, as well as rectors, &c., are bound by law to repair."

[Bovill, C.J. The form of words used by the pleader in stating the custom cannot be relied on; they are different in *Young* v. *Munby* (8), and are evidently chosen with reference to the subject matter of the action.]

There is not a case to be found in the books which extends the liability beyond domos, edificia, and structuras. To the passage relied on from 2 Burn's Eccl. Law, p. 152, as to hedges, fences, ditches, and timber, Dr. Phillimore's edition has appended a note of Serjt. Hill's, in which it is said, "This is transcribed from Gibson; but the authorities here cited do not warrant what is here laid down as to the executors. And the only colour for it is what is laid down in Res. Leg. s. 39, b., cited by Gibson. Vide Vin. Abr. tit. Waste (O. 5, 6, 7), that a bishop, archdeacon, or parson shall not have action for waste done in the time of his predecessors." Even

(1) 12 Q.B. 795; 17 L.J. (Q.B.) 366.
(2) 3 Lev. 268.
(3) 1 Lutw. 115.
(4) 1 Lutw. 116.
(5) 1 Lutw. 117.
(6) 2 T. R. 630.
(7) 2 T. R. at p. 637.
(8) 4 M. & S. 183.

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in the Ecclesiastical court, the rule seems to be limited to dilapidations to buildings: *Sollers* v. *Lawrence.* (1) In note (*a*) to *Wheatley* v. *Lane* (2), it is said: "Formerly it was doubted whether any action at *law* would lie for dilapidations, even by a succeeding rector, &c., against his predecessor, who had vacated by cession or otherwise; but this point was determined in *Jones* v. *Hill* (3); see also *Radcliffe* v. *D'Oyly* (4); and the temporal courts having once taken cognizance of such matters, it would seem that the action was considered to lie against the executors of a deceased rector, &c., from the necessity of the thing; and it is at this day of common occurrence: *Young* v. *Munby* (5); *Wise* v. *Metcalfe* (6); *Percival* v. *Cooke* (7); *Bird* v. *Relph.*" (8)

[Montague Smith, J. In *Bishop of Salisbury's Case* (9), "it was holden that, if a bishop, parson, or other ecclesiastical person do cut down trees upon the lands, unless it be for reparations of their ecclesiastical houses, and do or suffer to be done any dilapidations, they may be punished for the same in the Ecclesiastical court, and a prohibition will not lie in the case; and that the same is a good cause of deprivation of them of their ecclesiastial livings and dignities. But yet for such wastes done they may be also punished by the common law, if the party will sue there: vide 2 H. 4, 3."]

The case in the Year Book 2 H. 4, fo. 3, is precisely the other way, as pointed out by Eyre, C.J., in *Jefferson* v. *Bishop of Durham.* (10) In *Bird* v. *Relph* (11), where it was sought to make the executors of a deceased incumbent liable for their testator's neglect to cultivate the glebe-land in a husbandlike manner, the Court treat it as a novelty, and hold that there is no authority for the maintenance of such an action. If any such duty as is here insisted upon exists, it is remarkable that no instance of an attempt to enforce it is found in any of the earlier records. No trace of it is found in any of the constitutions of the church which defined

(1) Willes, 413.
(2) 1 Wms. Saund. 216, b.
(3) 3 Lev. 268.
(4) 2 T. R. 630.
(5) 4 M. & S. 183.
(6) 10 B. & C. 299.
(7) 2 C. & P. 460.
(8) 2 Ad. & E. 773.
(9) Godb. 259.
(10) 1 B. & P. 105, 122.
(11) 4 B. & Ad. 826.

the duties of ecclesiastical persons. The statements in Stephen's Eccl. Statutes, 424, n. 5, Gibson's Codex, 751, and Degge's Parson's Counsellor, c. 8, pp. 89 et seq., are all directed to restoring that which is out of order, and therefore point at something that is capable of reparation. Actions *at law* for dilapidations were probably introduced about the time of the conflict which ended in the Reformation; the precedents in Levinz go back to 18 Hen. 8; though it was some time before the experiment was successful: see the judgment of the Court of Queen's Bench in *Mason* v. *Lambert*. (1) It is true that dilapidations are stated by Degge to include all waste of the woods or lands of the church in Degge's Parson's Counsellor, pp. 89, 93. But the authorities cited are Year Book, 20 H. 6, fo. 46. a.; 3 Inst. 204; Year Book, 2 H. 4, fo. 3. b.; *Liford's Case* (2); and the Year Books, 29 E. 3, fo. 16. a., and 9 E. 4, fo. 34. a, and none of these authorities justifies the text. Gibson is in like manner not borne out by the authorities he quotes. He refers to Degge as "the first writer who advanced the notion of an action upon the case in the temporal courts for dilapidations" (p. 753, n. t.); and he goes on to say (p. 753, n. x.), referring to 13 Eliz. c. 10,—"This statute, in the particular case of a fraudulent conveyance, seems at first sight to limit the suit to the dilapidations that have grown in the time of the *last incumbent;* which (in case his predecessor did also leave dilapidations and die insolvent) cannot be known but by a regular survey of the defects at his first coming in, that thereby the respective dilapidations of the two predecessors may be distinguished. But in other cases, the last incumbent, or his executors, are chargeable with the *whole* dilapidations, in whose time soever they have grown; and, agreeably to the general rule may this statute also be well interpreted so as to make the present clause (*by his fact or default*) to be exclusive not of dilapidations which have grown in the time of the predecessors to the deceased, but of such as may have grown between the time of his decease and the prosecution for them; that is, either *in* the time of the vacation of the benefice, or *since* the time of the present incumbent." That would lead in the case of waste to the lands such as that now in question,

(1) 12 Q. B. 795, 800; 17 L. J. (Q. B.) 366.
(2) 11 Co. Rep. 49, b.

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to this intolerable hardship, that, inasmuch as the land cannot be restored, each successor of the present incumbent would be bound to sue.

[Bovill, C.J. Have you found any precedent of the form of pleadings in the Ecclesiastical court?]

No. (1) But a case is cited, arguendo, in *Bishop of St. Davids* v. *Lucy* (2), of Dr. Wood, Bishop of Lichfield and Coventry, 1687, who was suspended by Archbishop Sancroft for dilapidations, and the profits of his bishopric were sequestered, and the episcopal palace built out of them. That shews what the remedy was. In Lyndwood's Provinciale, p. 253, in the gloss on the constitution of Simon Mepham, is the largest statement to be found of the liability in this respect. In Gibson, p. 1498, is given a form of a commission issued by an archbishop to inquire into defects in the manors, &c., of a deceased bishop; and it is limited to "Defectus notabiles, reparatione necessariâ indigentes, in maneriis, domibus, muris, clausuris, ecclesiis, cancellis, locisque, libris, et ornamentis ecclesiasticis, ac rebus aliis episcopatûs." This was an attempt to impose upon the representatives of a deceased incumbent a liability larger than there is any trace of in the books; for, the charge was that their testator had not discovered and sued for a wrong done by his predecessor. Inability to obtain compensation from the preceding incumbent by reason of his having died insolvent, or the like, is stated in Conset's Eccl. Law (3), 3rd ed. 363, to be a sufficient excuse in a case of this sort, provided the last incumbent is shewn to have laid out a sufficient sum in necessary repairs. The result seems to be that every incumbent is bound to use reasonable care to transmit the demesnes of the church unimpaired to his successor. In *Duke of Marlborough* v. *St. John* (4), Vice-Chancellor Parker, following a case of *Knight* v. *Mosley* (5), in a suit by the patron, held that account will not lie for dilapidations. With respect to *Huntley* v. *Russell* (6), there is some confusion in the report of the

(1) *Wills*, on a subsequent day, referred the Court to Oughton's Ordo Judiciorum, vol. 2, pp. 24, 33, where such a precedent is to be found.

(2) 12 Mod. 237.

(3) A translation of Clarke's Praxis in Curiis Ecclesiasticis.

(4) 5 De G. & S. 174.

(5) Ambl. 175.

(6) 13 Q. B. 572; 18 L. J. (Q.B.) 239.

facts relating to the second count which renders it of little authority on the point now before the Court.

Cur. adv. vult.

July 4. The judgment of the Court (Bovill, C.J., Byles, Keating, and Montague Smith, JJ.) was delivered by

Byles, J. This was an action brought against the personal representative of the Rev. James Adcock, deceased, rector of the parish of Greetham, in the county of Lincoln, for dilapidations by himself and his predecessors.

The declaration alleged, in substance, that before James Adcock's death, large quantities of the gravel, earth, and soil of the glebe had been wrongfully dug and carried away, and remained unrestored at his death; that pits and holes had been there dug, and the soil removed; that wilful waste had been committed; and that the glebe lands at his death were and still remained out of repair, dilapidated, and wasted. No objection was taken to the declaration.

The plea on which the question arose was a plea denying that the glebe lands were wasted, &c., as alleged.

The facts were in substance these:—In the year 1793 a Local Inclosure Act was passed. By the inclosure award, made in 1795, a gravel-pit situate in the glebe, or adjoining thereto, was duly set out for the use of the parish. After the award, the surveyors had for some years exceeded the limits of the pit, by digging on the glebe. Of these trespasses Mr. Adcock, the deceased incumbent, had had no notice, and was entirely ignorant of them. Part of them had been committed in Mr. Adcock's time, viz. from December, 1849, to May, 1863: but the greater part had been committed during the incumbencies of his four predecessors. The jury returned a verdict for the plaintiffs, damages 160*l.*, finding that 60*l.* of the damage had been done in the time of the last incumbent, Mr. Adcock, and 100*l.* in the time of his said four predecessors. The defendant had leave to move to enter the verdict for himself, or to reduce it to the sum of 60*l.* The only contention before us was whether upon this evidence the defendant was liable.

Two questions, therefore, arise,—first, whether the defendant, the administrator of Mr. Adcock, the last incumbent, be liable in this action for the gravel dug in Mr. Adcock's own time,—and,

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secondly, whether he be liable for gravel dug during the incumbencies of Mr. Adcock's predecessors, immediate or remote.

In considering these questions, it is to be borne in mind that the inquiry is not whether a rector can lawfully commit or suffer such waste as is here charged and proved, but only whether *this action* lies for that waste, at the suit of his successor, against the personal representative of the deceased. An ecclesiastical corporation aggregate, like a Dean and Chapter, might, it is said, at the common law, until restrained by statute, have committed waste. But it is plain that an ecclesiastical corporation sole having perpetual succession, like a rector or vicar, cannot at common law commit waste. He would be liable to a suit in the Ecclesiastical court, and he might, according to Lord Coke, be liable to a prohibition from a superior Court of law (see the authorities in *Jefferson* v. *Bishop of Durham* (1), where, however, this Court refused to issue a prohibition), or he might be restrained by injunction in equity, or punished in the Ecclesiastical court by deprivation. But, whether his executors would be liable to his successor in this form of action for such an injury as this, which does not affect houses or buildings, or the chancel of the church, or walls, or fences, and is an injury which cannot be made good by any expenditure of the succeeding incumbent, is a very different question.

Serious and singular consequences might follow if the remedy were extended beyond the antient limits, of non-repair to buildings and fences, and the executors of the deceased incumbent were made liable for every species of voluntary or permissive waste committed or suffered by their testator or his predecessors. We ma suppose the case of a prebendary or rector in a rich mining county, like Durham or Cornwall. On his decease, his executors, if the remedy were extended to all sorts of waste, would be liable not only for coals or copper raised in his own time, without his permission or knowledge, from mines extending (without his knowledge) under the glebe; but they would also be liable for the coals or copper so abstracted by or from any number of his predecessors. The statutes of limitations would afford imperfect protection, where there is a change and succession of incumbents, because the neglect

(1) 1 B. & P. 105.

of a prior incumbent to sue his predecessor is no answer in the case of permissive and continuing waste. Moreover, in cases where the complaint is the digging of minerals, the application of the damages to the repair of the injury inflicted or permitted, is impossible.

From this impossibility flows another consequence: the measure of damage is wanting. That measure is, as we shall presently see, the cost of effecting the repairs. But, in the cases just mentioned, and in the case now before us, repair or restitution being impossible, no measure of damages seems to be left but the value of the coals or copper or gravel. Can that value be the proper measure of the damages inflicted on the successor? Is the successor to capitalize and appropriate to his own use a value of which upon his own hypothesis he could not have enjoyed even the usufruct?

Again, if the mines were open when his predecessor abstracted a portion of the minerals, and the bulk remains, then, if that working were lawful, he can do the same, and no action lies; but, if that working were unlawful, then it is no injury to him, for, the successor could not have worked the mines, even if that previous working had not taken place. Indeed, if the predecessor had opened the mines for the first time, that, according to Lord Hardwicke in *Knight* v. *Mosley* (1), might have been a benefit to the successor; for, the mines being already opened, the successor might have worked mines which he could not otherwise have worked at all.

To avoid such consequences as these, we ought to inquire very carefully into the origin and extent of the liability of the executors of a deceased incumbent. The reason and the extent of their liability must be sought in the historical sources from which that liability originally proceeded.

The earliest provision on this subject with which we are acquainted, is to be found in the Provincial Constitution of Edmund Archbishop of Canterbury, 21 Hen. 3, in the year 1238: "Si rector alicujus ecclesiæ decedens domos ecclesiæ reliquerit dirutas vel ruinosas, de bonis ejus ecclesiasticis *tanta portio deducatur quæ sufficiat ad reparandum hæc*, et ad alios defectus ecclesiæ suppliendos:" Lyndwood, Lib. III. tit. 27, p. 250.

(1) Amb. 175.

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Cardinal Othobon, then legate of the Holy See in England (and afterwards Pope Adrian V.), appears to have convened an Anglican Council, which assembled in St. Paul's cathedral, in London, April, 1269 (52 Hen. 3). At this council were present the Archbishops of Canterbury and York, the bishops, abbots, priors, archdeacons, and other ecclesiastical dignitaries: See the proceedings at length in Lyndwood, Constitutiones Legatinæ, p. 112. One of the constitutions or statutes of this assembly relates to ecclesiastical buildings, and is thus headed, p. 112,—"De domibus ecclesiarum reficiendis." It is preceded by a summary which commences in these words: "*Domus et ædificia* beneficiorum à beneficiatis eorum expensis reparentur." The constitution itself begins by reciting the mischief, and censuring the avarice of those who, though they receive the profits of their benefices, neglect the repair of the houses and other buildings thereon; and then proceeds to enact as follows: "Statuimus et præcipimus ut universi clerici suorum beneficiorum domos et cætera ædificia prout indiguerint reficere studeant condecenter, ad quod per episcopos suos vel archidiaconos solicitè moneantur. Si quis vero post episcopi vel archidiaconi monitionem per duos menses id facere cessaverit, extunc episcopus istius clerici sumptibus id fieri faciat diligenter de fructibus ipsius ecclesiæ et beneficii, præsentis auctoritate statuti, tantum accipi faciens quantum ad refectionem hujusmodi sufficiat peragendam."

It is plain, from these antient authorities, that the mischief to be remedied was the dilapidation of houses and buildings; and the remedy was the enforced expenditure by the offending incumbent, if still living, of so much as would put the buildings into repair.

Hence arose the action at law against the preceding incumbent, if he had vacated the benefice by promotion or otherwise, and were still living.

At one time, in conformity with the principles of the common law, it seems to have been considered that such an action as the present would not lie against the executors of a deceased incumbent: "Et al common ley ceo ne fuit q'un action personel, quel per le mort d'un person est ale a touts jours:" Year Book, 2 H. 4, fo. 3, pl. 7. Precedents, however, of this form of action more than three centuries old exist. Still it has been often called an anomalous

action, and such it undoubtedly is; for, it makes executors liable for a tort of their testator, which at common law could not be, and liable moreover to a person to whom the testator was not liable in his life-time; see 1 Wm. Saund. 216*b*, n. (*a*), observing on a dictum of Willes, C.J., in *Sollers* v. *Lawrence* (1), attempting to account for this action. We cannot, therefore, safely decide on general principles when this action lies or does not lie; but must be guided by the precedents as well as by the particular mischief to which we have already adverted, and to remedy which alone this form of action was introduced.

The earliest precedents with which we are acquainted appear to be among the rolls of this Court. One of them is as early as 18 Hen. 7. Another is 15 Hen. 8, roll 306. The translation of the latter is to be found in Herne's Pleader, 136, published in the time of the Commonwealth (1657). The law and custom of the realm binding on the incumbents is there stated to be an obligation to repair all and singular the *houses and buildings*, and, if they do not, then their executors to satisfy all such sums of money as by the successor *shall be expended or paid for the necessary repair or rebuilding*.

The precedents from which the more modern English precedents appear to be taken and translated are, the forms of the declaration in two cases in 1 Lutwyche, pp. 115, 116, in which latter the custom is thus stated: "Secundum legem et consuetudinem Angliæ, rectores et vicarii omnes et singulas domos et ædificia reparare et sustentare ac ea successoribus suis reparata et sustentata demittere et relinquere teneantur:" and the extent of the obligation is laid thus,—to pay "tantam pecuniæ summam quantam pro reparatione aut necessaria re-edificatione hujusmodi domorum et ædificiorum expendi aut solvi sufficiet."

These precedents have been justly regarded as declaring the law. They have been used to shew against whom an action lies, e.g., that it lies at the suit of the successor against the executors of a deceased prebendary,—*Radcliffe* v. *D'Oyley* (2),—and they are not less useful to shew for what sort of waste the action lies, "domos et ædificia," &c.; and this they do doubly, by specifying not only that the dilapidations are the dilapidations of buildings

(1) Willes, 421.

(2) 2 T. R. 630.

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or erections which *can* be repaired, but further by stating how the damages are to be measured, viz. by the cost of repairs, and how they are to be applied, viz. in the actual repair of the ruinous or dilapidated buildings.

We are not aware of any antient precedent or decision extending the liability of the executors of a deceased incumbent to any species of waste beyond dilapidations of the house, the chancel, or other buildings or fences of the benefice. And, in modern times, it has been held by the Court of Queen's Bench, in *Bird* v. *Relph* (1), that the action will not lie for mismanagement or miscultivation of the ecclesiastical property by the deceased incumbent: and this decision was confirmed in the judgment of the same Court in *Huntley* v. *Russell.* (2)

Some authorities, nevertheless, have been relied on in support of the present action.

The Bishop of Salisbury's Case (3) has been cited to shew that this action lies for cutting timber. But that case refers to the jurisdiction of the Ecclesiastical court, and shews that the offender may be punished there, even to the extent of deprivation. And, though the reporter adds that the offender may be punished at the common law, yet the authority cited, Year Book, 2 H. 4, fo. 3, so far from proving the position, shews that at that time this action did not lie at all after the death of the incumbent.

Degge's Parson's Counsellor, c. 8, was referred to: but it does not shew that an action lies in a case like the present.

A passage was cited from Gibson's Codex, to shew that this action may lie against the executors of a deceased incumbent for cutting down trees. But the authorities in the margin do not support the position. Besides, in Tyrwhitt's and Phillimore's editions of Burn's Ecclesiastical Law, to this passage from Gibson is appended a note referring to Hill's MSS.: and we collect from that note that he doubted the accuracy of Gibson's statement as to this action lying for cutting down trees. The opinion of Bishop Gibson, who, though an indefatigable compiler, was not a lawyer by education or profession, weighs little against the doubt of so profound a lawyer as Mr. Serjt. Hill.

(1) 4 B. & Ad. 826.

(2) 13 Q. B. 572, 590; 18 L. J. (Q.B.) 239.

(3) Godb. 259.

The case of *Knight* v. *Mosley* (1) was the case of a bill by a patron against an incumbent to stay waste committed by digging stones, &c., on the glebe. It is no authority for such an action as this, under such circumstances as the present; but rather tends to shew that this action for such an injury is unnecessary. Indeed, it should seem from the authorities, that not only the patron, but the ordinary, and, in case of need, the Metropolitan, or even the Crown, may interpose as to any kind of waste to ecclesiastical property: *Jefferson* v. *Bishop of Durham* (2); *Wither* v. *Dean and Chapter of Winchester* (3); *Hoskins* v. *Fetherstone* (4); *Duke of St. Albans* v. *Skipwith* (5); *Duke of Marlborough* v. *St. John.* (6)

The case *Huntley* v. *Russell* (7) seems at first sight a decision in favour of the plaintiff. But that case is subject to many observations. The second count of the declaration there (which is the only one that touches the question now before us) charged the defendant's testator with excavating a gravel-pit, carrying away the gravel, and not levelling or sloping down the pits afterwards. The jury found the damage for not sloping down so much of the land as had been excavated for private purposes to be 5*l.* The very learned judge who tried the cause, Mr. Baron Parke, told the jury (8) "that it was questionable whether that omission could be charged as waste in the rector." Mr. Justice Patteson, in delivering the judgment of the Court of Queen's Bench in the same case says (9): "We do not mean to hold that any action could be maintained in any shape against the present defendants for this omission. Such omission would seem rather to be in the nature of a misfeasance in the management and cultivation of the estate, for which this Court has already held, in the case of *Bird* v. *Relph* (10), that an action will not lie against the executors of a deceased incumbent." "It is, however," he adds, "unnecessary to determine the point on the present occasion." This part of the judgment is strongly in favour of the present defendant. But the Court proceed to direct the verdict to be entered for 5*l.*, as for the

(1) Amb. 175.
(2) 1 B. & P. 116, 131.
(3) 3 Mer. 421.
(4) 2 Bro. C. C. 552.
(5) 8 Beav. 354.
(6) 5 De G. & S. 174.
(7) 13 Q. B. 572; 18 L. J. (Q.B.) 239.
(8) 13 Q. B. at p. 579.
(9) 13 Q. B. at p. 590; 18 L. J. (Q.B.) at p. 243.
(10) 4 B. & Ad. 826.

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value of the gravel removed. The Court appear to have overlooked the fact that the jury had given the 5*l.* damages, not for the value of the gravel, but for not sloping down. (1) And, as has already been observed, if the taking of gravel by the preceding incumbent were unlawful, then an action at the suit of his successor could not, under ordinary circumstances, lie for so doing, because the plaintiff in that action could not have taken the gravel, even if his predecessor had not done so. Moreover, in *Huntley* v. *Russell* (2), the liability for gravel removed was fixed on the defendants by the Court, because the lessee of the testator had dug gravel for sale and sold it *for the first time.* But the Court add, as to digging gravel: "If the gravel-pits in question had before the incumbency of the last incumbent been opened and used for getting gravel for sale generally, we should incline to the opinion of Lord Hardwicke in *Knight* v. *Mosley* (3), that the incumbent had not committed waste by continuing so to use them." In the case now before us, the gravel-pits had been opened and the gravel carried away during four previous incumbencies, and used, as we collect, for parish purposes, but not by the incumbents themselves, or even with their knowledge.

It is true that, where this action lies, it lies not merely for voluntary but for permissive waste, and true also that each incumbent is liable for the waste of his predecessor. But there is not

(1) 13 Q. B. 578. It would appear from a comparison of the head-note and of the contemporary reports (18 L. J. (Q.B.) 239; 13 Jur. 837; 13 L. T. 526), that this is a mistake of the reporter, and that the jury really found the 5*l.* as the value of the gravel removed, as stated in the judgment. The case may, however, perhaps be reconciled with the principal case by observing that in *Huntley* v. *Russell*, the rule was to enter the verdict pursuant to leave reserved, and not in arrest of judgment. The second count, as appears from the report in the Law Journal (18 L. J. (Q.B.) 240), stated that, by the law and custom of England, the respective rectors of England for the time being ought not to commit wilful waste or spoil in *the lands* of or belonging to their rectories, and alleged that waste of the glebe had been committed by defendant's testator while rector. The only plea was a plea of no waste. The custom as alleged was therefore admitted; and the question whether the custom of England was not confined to dilapidations of buildings could not have been raised on that rule; and the Court, in making the rule absolute to enter the verdict for the plaintiff, did not, therefore, in any way decide that any custom really existed which would have entitled him to recover in such an action.

(2) 13 Q. B. 572; 18 L. J. (Q.B.) 239.

(3) Amb. 175.

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only no evidence to shew knowledge on the part of the last incumbent, or on the part of any one of his predecessors, or to shew any laches in either; but we collect that, long before the last incumbency, it had been an open gravel-pit; and therefore, applying the language of the Court of Queen's Bench in *Huntley* v. *Russell* (1) to this gravel-pit, we doubt whether what has been done or left undone by the last incumbent, would, by that Court, in any form of proceeding, have been held to amount to waste.

We, however, for the reasons already given, have come to the conclusion that this is not such waste as can be the subject of *this action.*

As our opinion is in favour of the defendant on the first point, viz. that he is not liable in this action for the alleged permissive waste of the last incumbent, his intestate, so by the stronger reason we hold that he is not liable for the like alleged waste in the time of the several predecessors of the last incumbent.

The rule, therefore, to enter the verdict for the defendant as to the whole amount, will be made absolute.

Rule absolute.

Attorneys for plaintiffs: *Scott & Tahourdin.*
Attorneys for defendant: *Hughes & Sons.*

(1) 13 Q. B. 572; 18 L. J. (Q.B.) 239.

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after plea entered a nolle prosequi as to B. and C., and, failing to prove a joint contract by the three, sought to amend the record by striking out of it the names of B. and C.:—*Held*, per Bovill, C.J., not an amendment warranted by s. 37 of the Common Law Procedure Act, 1852.
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BANKRUPTCY—*Discharge of Debtor out of Custody—Costs.*] An order of discharge in bankruptcy does not protect from arrest for the costs of an action in which judgment has been signed after the bankruptcy, even if the debt recovered in the action has been proved for under the bankruptcy.
MAUGHAN *v.* VINESBERG 318

2. ————, *Reputed Ownership under* 12 *&* 13 *Vict. c.* 106, *s.* 125 *—Debt or Chose in Action.*] R. contracted to supply meat to a lunatic asylum; but, being unable to carry out the contract, assigned it to

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H., who delivered his own meat, but in R.'s name, the governing body of the asylum having no notice of the assignment, and not being aware that the contract was not being performed by R. The contract having been put an end to by notice from the committee of visitors of the asylum, and R. having become bankrupt, the assignee under the bankruptcy claimed the sum then due for meat supplied as being "goods and chattels" in the possession, order, or disposition of R. at the time of his bankruptcy, as reputed owner, with the consent and permission of H., the true owner, within the 125th section of the Bankrupt Act, 1849, 12 & 13 Vict. c. 106:—*Held*, by Bovill, C.J., Byles and Keating, JJ., that the debt in question was within the order and disposition clause, and passed to the assignee; but that the latter could not avail himself of his right thereto without an order from the Court of Bankruptcy to sell,—a permission to sue for the debt not being sufficient for that purpose. *Held*, by Willes, J., that, the meat never having been in R.'s possession, the debt which resulted from the supply to the asylum (though apparently by R.) was not a debt in his possession, order, or disposition at the time of his bankruptcy with the consent of the true owner.

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3. BANKRUPTCY—*Mutual Credits—Bankrupt Act*, 1849 (12 & 13 *Vict. c.* 106), *s.* 171—*Authority to collect Money.*] The plaintiffs were in the habit of drawing bills upon merchants in Bombay, and handing them to the defendants, bankers in London, for collection by the defendants' Bombay branch, the proceeds when received being remitted by the Bombay branch to the plaintiffs through the defendants' house in London. The plaintiffs executed a deed of inspectorship under the Bankruptcy Act, 1861, the defendants then having in their hands 3248*l.* of the plaintiffs', the proceeds of bills collected in Bombay. At the same date the plaintiffs were indebted to the defendants on certain bills of exchange in the sum of 8335*l.*:—*Held*, a case of mutual credit within s. 171 of the Bankrupt Act, 1849. *Young* v. *Bank of Bengal* (1 Moo. P. C. 150), distinguished.

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BANKRUPTCY ACT, 1861 (24 & 25 VICT. C. 134), S. 198—*Composition Deed—Certificate of Registration—Right of Debtor to be Released from Custody.*] A. was taken into custody under a ca. sa. after having executed a composition deed, and obtained a certificate of protection and discharge under the provisions of the Bankruptcy Act, 1861, s. 198. The deed, though good upon the face of it, was invalid, and notice of its invalidity was given to the sheriff:—*Held*, that the sheriff was bound, notwithstanding such notice, to release A. out of custody on the production of the certificate.

AMES *v.* COLNAGHI 359

2. ————————————————————, s. 192—*Evidence.*] Upon a plea of composition and release under s. 192 of the Bankruptcy Act, 1861:—*Held*, that the production of the deed and certificate of registration, and sealed copies of the affidavits required by s. 192 and by the General Rules of 1862, will not dispense with proof that a majority in number representing three-fourths in value of the creditors of 10*l.* and upwards have in writing assented to or approved of the deed.

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3. BANKRUPTCY ACT, 1861 (24 & 25 Vict. c. 134), s. 192—*Composition Deed—Joint and separate Creditors—Pleading—Departure.*] To an action on a promissory note, the defendants James and Frances pleaded a deed under s. 192 of the Bankruptcy Act, 1861, whereby, after reciting that they had carried on business in partnership, all their property was assigned to trustees in trust to pay a composition to the joint creditors of the two and to the separate creditors of James; and the plea averred that the requisite majority in number and value of the joint creditors of the two defendants and of the separate creditors of James had assented to the deed; that there were no separate creditors of Frances; and that all things had been done to make the deed binding on all the creditors. The plaintiffs replied, setting out the promissory note declared on, which was the joint and several note of the two defendants,—the defendants rejoined that the note was given on account of and by way of security for a debt due to the plaintiffs from the defendants jointly. On demurrers to the pleas and replications and rejoinders respectively:—*Held*, by Byles, Keating, and Montague Smith, JJ. (Bovill, C.J., dissenting), that, there being no separate creditor of Frances distinct from the joint creditors, but only a liability on her part to be sued separately upon a note given by way of security for a joint debt, the deed, which discharged the joint debt, necessarily discharged the several liability also. *Held*, by Bovill, C.J., that the effect of the note being to create a separate legal debt on the part of Frances, the deed was no discharge as to that debt; and that, as the deed did not bind all the creditors, it did not bind any non-assenting creditors. *Held*, further, that the replication was no departure, as it did not set up the separate liability as the cause of action, but only for the purpose of defeating the plea, and thus maintaining the cause of action stated in the declaration.
Rixon and Another, Executors of Thomas Farncomb, Deceased, *v.* James Emary and Frances Emary 546

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BILL OF EXCHANGE—*Invalid Indorsement in France of Bills drawn there and accepted in England.*] A bill of exchange was drawn in France upon and accepted by the drawee in London, and indorsed in France, but not so as to convey to the indorsee according to the French law any property in or right to sue upon the bill there in his own name:—*Held*, per Bovill, C.J., and Willes, J. (Montague Smith, J., dissenting), that the acceptor was not liable to an action in this country at the suit of the indorsee. *Trimbey* v. *Vignier* (1 Bing. N. C. 151), and *Lebel* v. *Tucker* (Law Rep. 3 Q. B. 77), discussed.
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BILL OF LADING—*Ship and Shipping—Negligence—Onus of Proof.*] Goods were shipped on board a steamer under a bill of lading which

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contained an exception from liability for "breakage, leakage, or damage." The goods were found at the end of the voyage to be injured by oil. It was proved that there was no oil in the cargo, but that there were two donkey engines on deck, near the place where the goods were stowed, in lubricating which oil was used; there was no direct evidence of how the injury to the goods occurred. In an action against the shipowners:—*Held*, that the exception did not protect the shipowners from liability for damage accruing through the negligence of their servants, but that it did shift the onus of proof, and that it was incumbent upon the plaintiffs to prove affirmatively the negligence of the defendants' servants:—*Held*, also, that the above facts were evidence upon which a jury were justified in finding the existence of negligence.

CZECH AND ANOTHER *v.* THE GENERAL STEAM NAVIGATION COMPANY 14

2. BILL OF LADING—*Indorsement—Evidence of Property in the Goods in Indorsee*—18 *&* 19 *Vict. c.* 111, *s.* 1.] In an action upon a bill of lading by an indorsee against the shipowners, for not delivering the goods, the plaintiff put in the bill of lading, and proved that the consignors had indorsed and delivered it to A., and that A. had indorsed and delivered it to the plaintiff for value:—*Held*, evidence to go to the jury of such an indorsement and delivery of the bill of lading as to vest the property in the goods in the plaintiff; and so to transfer to him the right of action, under 18 & 19 Vict. c. 111, s. 1.

DRACACHI *v.* THE ANGLO-EGYPTIAN NAVIGATION COMPANY .. 190

3. ——————, *Ship and Shipping—Construction—Exception of Barratry and Accidents of the Seas, &c.—Negligence—Merchant Shipping Act*, 1854 (17 *&* 18 *Vict. c.* 104), *s.* 299.] The plaintiff shipped goods on board the defendants' vessel, *Black Prince*, under a bill of lading which contained an exception of, amongst other things, "barratry of the master and mariners," and "accidents or damage of the seas." In the course of the voyage the *Black Prince*, meeting a vessel called the *Araxes* under circumstances which rendered it the duty of the *Black Prince* to port her helm, neglected to do so, and the result was that the *Black Prince*, with the plaintiff's goods on board, was run down and totally lost:—*Held*,—affirming the judgment of the Common Pleas,—that the conduct of the master, though a "wilful default" by s. 299 of the Merchant Shipping Act, 1854, did not amount to "barratry," nor was the loss a loss "by accidents or damage of the seas," within the exception in the bill of lading. The judge left it to the jury to say whether the collision was caused by the negligence of the defendants' crew, and whether there was any want of ordinary care on the part of the *Araxes* by the exercise of which the collision might have been avoided:—*Held*, a proper direction, and that he was not bound to leave it to them to say whether the persons in charge of the *Araxes* might not have mitigated the calamity by stopping or backing when they found a collision inevitable.

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BURIAL ACT, 15 & 16 VICT. c. 85—*Construction—Grant of exclusive Right of Burial—Keeping Grave in Repair.*] The burial board of St. Pancras granted to R. "the right and privilege of constructing a private grave" in their cemetery, and "the exclusive right of burial and interment therein," "to hold to her in perpetuity, for the purpose of burial and of erecting or placing therein a monument or stone;" with a proviso that, if such monument or stone with the appurtenances should not be kept in repair, according to such regulations as should be made by the board for the management of the cemetery, the grant should be void. R. constructed a grave, and placed a head-stone and a kerb round it, and planted the space with shrubs and flowers:—*Held*, that it was not competent to the board by a regulation subsequently made by them for the management of the cemetery to deprive R. of the right of planting and ornamenting the grave.
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CARRIERS ACT (11 GEO. 4, & 1 WM. 4, c. 68), s. 1—*Accessories.*] A lace corporal in a gilt frame, covered with glass, being intended for an exhibition, was enclosed in a packing case, and sent, without any declaration under the Carriers Act, by the defendants' railway, and lost:—*Held*, per Bovill, C.J., & Byles, J. (Willes, J. dubitante), that as a matter of fact the gilt frame was distinct from and not accessory to the lace, and the packing case accessory to both or to the frame only, and that the carrier therefore was not protected by the Carriers Act from liability as respected either the gilt frame or the packing case.
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CHARTERPARTY—*Construction—Full Cargo—Broken Stowage.*] By a charterparty the merchant contracted to load "a full and complete cargo of sugar in cases, or other lawful merchandize, with sufficient bags for broken stowage," at a certain rate of freight per ton for sugar, "and for other produce a rate proportionate to sugar in casks, with sufficient bags for broken stowage, agreeably to the custom of the port of loading." By the custom of the loading port, a given quantity of cotton was to be taken as equal to a ton of sugar. The charterer filled the ship with cotton, putting on board a reasonable quantity of stone for ballast:—*Held*, that the stipulation for "sufficient bags (of sugar) for broken stowage" was only applicable to a cargo of sugar in cases or casks, and consequently that the engagement to ship a full cargo of lawful merchandize was performed.
DUCKETT *v.* SATTERFIELD AND ANOTHER 227

2. ———————, *Demurrage—"Accident."*] The defendant agreed by charterparty to load the plaintiff's ship with coal, in regular and customary turn, "except in cases of riots, strikes, or any other accidents beyond his control" which might prevent or delay her loading. To an action for breach of the above covenant in the charterparty, the defendant pleaded that he was prevented loading the vessel by a snowstorm, which rendered it impossible to bring the cargo to the agreed place of shipment:—*Held*, on demurrer, that a snowstorm was not an "accident" within the meaning of the exception, and that the plea was bad.
FENWICK *v.* SCHMALZ 313

CHEQUE—*Bill of Exchange—Statute of Limitations* (21 *Jac.* 1, *c.* 16), *s.* 3—*Loan.*] The plaintiff having agreed to lend the defendant a sum of money, gave him a cheque for the amount, which the defendant paid into his bankers, receiving credit for it. The cheque was not paid by the plaintiff's bankers till some days later. In an action for the money so lent:—*Held*, that the Statute of Limitations only ran from the time of the payment of the cheque by the plaintiff's bankers.
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CHURCHYARD—*Freehold—New District—Effect of s.* 10 *of Lord Blandford's Act,* 19 *&* 20 *Vict. c.* 104.] In 1816, under a local act, a new church was built in St. Pancras, which was to be "the parish church," the old church being thereby converted into a "parish chapel." In 1853, by an order in council, the original burial-place for the parish, which surrounded the old church, and also an additional ground provided under an earlier local act, were closed, and a cemetery was provided for the whole parish. In 1863, that part of the parish in which the old church stood was turned into a new district, and the "parish chapel" was declared to be the church of that district:—*Held,*—affirming the judgment of the Court of Common Pleas,—that the 10th section of Lord Blandford's Act, 19 & 20 Vict. c. 104, did not operate to vest the old churchyard in the incumbent of the new district church, but that the freehold thereof still remained in the vicar of the parish.
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CIRCULAR NOTES—*Loss—Money had and received—Failure of Consideration.*] The plaintiffs, through an agent, obtained from the defendants, bankers in London, circular notes payable by certain correspondents of the defendants at various foreign towns mentioned in a "letter of indication," which accompanied the circular notes. The letter of indication and the circular notes were transmitted by the agent, by post, to the plaintiffs in Paris; the letter of indication was duly received by them, but the circular notes were lost in the transit:—*Held,* that, as the defendants might possibly still be called upon to pay the circular notes, the plaintiffs, apart from any equitable relief to which they might be entitled upon giving a proper indemnity, were not entitled to recover the money which their agent had paid to the defendants upon tendering the letter of indication only.
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6. ——————————, s. 65 295
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COMPANIES ACT, 1862 (25 & 26 VICT. c. 89)—*Voluntary Winding-up—Set-off in Action for Calls—List of Contributories—Notice.*] In an action by the liquidator of a limited company being voluntarily wound up under the Companies Act, 1862, against a contributory for calls, the defendant may set off a debt due to him from the company. *Secus* where a limited company is being wound up by the Court or under the supervision of the Court. *Grissell's Case* (Law Rep. 1 Ch.

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App. 528), distinguished. In an action for calls against a contributory of a limited company being voluntarily wound up, it is no defence that the defendant had no notice that his name was placed upon the list of contributories.

BRIGHTON ARCADE COMPANY, LIMITED, *v.* DOWLING 175

2. COMPANIES ACT, 1862 (25 & 26 VICT. c. 89), s. 13—*Change of Name —Notice of Call—Surrender of Shares—Construction of Resolution.*] A new certificate of incorporation is necessary to complete a change of name by a company under s. 13 of the Companies Act, 1862. It is not enough that the change has been sanctioned by a special resolution of the company and approved by the Board of Trade. On the 18th of July, 1867, a company duly passed a resolution to change its name, which resolution was confirmed on the 9th of August. On the 23rd of August the directors made a call in the old name of the company. On the 7th of September the approval of the change of name by the Board of Trade was obtained; and on the 13th notice of the call, in the new name, was given to the shareholders. On the 31st of December, 1867, an action in the old name was brought against a shareholder who knew of the proposed change of name, to recover the amount of the call. The certificate of incorporation in the new name was not issued until the 13th of February, 1868:—*Held*, that the action was properly brought in the old name of the company; and that the notice of the call in the new name was sufficient, as it in fact gave the defendant notice that the call had been made. The company passed a resolution authorizing the directors, "if they should think fit," to accept transfers from such shareholders as should give notice of their willingness to surrender their shares:—*Held*, that this was not binding on the company as an agreement to accept such surrenders.

SHACKLEFORD, FORD, AND CO., LIMITED, *v.* DANGERFIELD. SAME *v.* OWEN 407

3. ——————————, *Trading Corporation—Contract not under Seal.*] Whether a trading corporation can contract without seal or not, depends, not upon the magnitude or the insignificance of the subject-matter, but upon whether or not the contract be for a purpose connected with the objects of the incorporation. A company incorporated under the Companies Act, 1862, for the working of collieries, contracted with an engineer for the erection of a pumping-engine and machinery for that purpose, and paid him part of the price. In an action by the company against the engineer for a breach of contract in refusing to deliver the engine and machinery:—*Held*, that the action was maintainable, though the contract was not under seal. By the articles of association of the company it was provided that the business thereof should be carried on under the management of the board of directors; and that the board, in addition to the powers and authorities by the statutes, and by those presents expressly conferred upon them, might execute all such agreements, and generally do all such acts and things as were by the statutes and those presents directed or authorized to be executed or done by the company in meeting, &c.:—*Held*, by Bovill, C.J., and Byles, J., that the contract in question was warranted by the articles of association, and that there was nothing in them or in the statute requiring it to be under seal.

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On an application by a judgment creditor of a company for a scire facias against a shareholder, under 8 Vict. c. 16, s. 36, the Court has a discretion as to allowing the writ to issue.
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2. COMPANY—*Scire facias—Companies Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 16), *s.* 36—*Assets of Company.*] The Court has jurisdiction under 8 & 9 Vict. c. 16, s. 36, to order a writ of scire facias to issue against a shareholder upon a judgment obtained against a company, although there be property of the company which has not been taken in execution, if such property is not sufficient to satisfy the debt of the judgment creditor.
THE ILFRACOMBE RAILWAY COMPANY *v.* LORD POLTIMORE .. 288

3. ————, *Construction of Articles of Association—Disqualification of Directors—Secretary.*] By the articles of association of a joint-stock company it was provided that any director who should accept or hold any other office under the company than that of manager, should thereupon be disqualified from being and should cease to be a director. A. had been appointed secretary at a salary, and whilst secretary he was elected a director, and appointed upon a committee to exercise certain powers of the directors: from the time of his election he received salary as a committee-man, but ceased to receive salary as secretary, though he continued to perform all the duties of the office: —*Held*, that A. did not hold an "office" under the company, so as to disqualify him from being party as a director to the making of a call.
THE IRON SHIP COATING COMPANY, LIMITED, *v.* BLUNT 484

4. ————, contract not under seal by a trading 463
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5. ————: *See* RAILWAY COMPANY.

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CONSIDERATION, right of action on loss of circular notes as for a failure of 1
See CIRCULAR NOTES.

CONSTRUCTION—*Devise — Estate-Tail — Child in ventre sa Mère.*] Testator devised as follows:—"I give and bequeath unto my dear wife, M. P., all my estate of land, situate, &c., for her natural life; and, after her decease, I give and bequeath the same unto my daughter, M., wife of A. R., *to her and her children for ever*." At the date of the will and of the death of the testator, the daughter M. was enceinte of a daughter, who was born after the testator's death. She had afterwards other children, who survived:—*Held*,—affirming the

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decision of the Court of Common Pleas,—that the testator's daughter, M., took an estate-tail.
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4. ——— of grant of licence to use a patent 202
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5. ——— of "sufficient bags for broken stowage" in a charterparty 227
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6. ——— of "any other accidents beyond his control" in a charterparty 313
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7. ——— of resolution of company respecting the surrender of shares 407
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8. ——— of "barratry of master or mariners," and "accidents or damage of the seas," in a bill of lading 476
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11. ——— of contract for sale of public-house 511
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12. ——— of Burial Act, 15 & 16 Vict. c. 85 523
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13. ——— of suing and labouring clause in policy of marine insurance 630
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14. ——— of collision clause in policy of marine insurance .. 630
See MARINE INSURANCE. 5.

CONTRACT—*Parties—Signature for Self and Partners or Principals—Power of Attorney.*] C. & Co., merchants in Spain, being possessed of mines in that country, gave one J. a power of attorney authorizing him to sell them for a sum not less than 40,000*l.*, J.'s remuneration being a moiety of any sum he might obtain beyond that price. J. contracted to sell the mines to the defendants, by an agreement which professed to be made "between J., acting for himself and also under a letter of attorney for and on behalf of A., B., and C., all three of them co-proprietors with him of various mines in Spain, and carrying on business in co-partnership with him under the style of C. & Co.," of the one part, and the defendants of the other part. In the body of the agreement C. & Co. were described as the "vendors," and there was a stipulation that the mines were to be delivered by the vendors to the company with a good title. The agreement was signed by J., "for self and partners," and was sealed with the seal of the company:—*Held*, that J. alone could not maintain an action against

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the company for breach of this agreement, but that A., B., and C., being parties to the contract, must be joined as plaintiffs.
JUNG *v.* PHOSPHATE OF LIME COMPANY, LIMITED 139

2. CONTRACT respecting ship made after ship mortgaged 38
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3. ————, what sufficient writing under s. 17 of Statute of Frauds .. 52
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4. ———— not under seal by a trading corporation 463
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CONTRIBUTORY, it is not a defence in an action for calls that, has had no notice that his name is on list of contributories 175
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CONTRIBUTORY NEGLIGENCE: *See* NEGLIGENCE.

CORPORATION, contract not under seal by a trading 463
See COMPANIES ACT, 1862. 3.

COSTS—*Ejectment—Liability of Co-defendants—Common Law Procedure Act*, 1852 (15 & 16 *Vict.* c. 76), *ss.* 174, 205.] In an action of ejectment, in which there are several defendants, and the plaintiff succeeds, each of the defendants, although defending only for part of the premises claimed in the action, is liable for the whole of the plaintiff's costs.
JOHNSON AND OTHERS *v.* MILLS AND OTHERS. RE FOOT .. 22

2. ————, *Arbitration.*] A cause and all matters in difference were referred by an order at Nisi Prius, which provided that the costs of the reference and award should abide the event of the award. The arbitrator decided the cause in favour of the defendant, and with respect to the matters in difference, awarded that the plaintiff had a valid claim against the defendant, and that the defendant had a valid claim against the plaintiff of larger amount, and directed the plaintiff to pay the difference to the defendant. The claims were unliquidated, and could not have been set off against one another in an action:—*Held*, that the event of the award was wholly in the defendant's favour, and the defendant therefore entitled to the costs of the reference and award.
DUNHILL *v.* FORD 36

3. ————, *Taxation—Attendance of the Country Attorney at a Trial in London.*] Where on the trial of a cause in London, the country as well as the London attorney attends, the rule that the costs of the attendance of the country attorney will not be allowed on taxation is not inflexible, but the master should decide, in the exercise of his discretion, whether, under all the circumstances of the case, such attendance was necessary.
BELL *v.* AITKIN AND OTHERS 320

4. ————, *Certificate*—3 *&* 4 *Vict. c.* 24, *s.* 2—"*Immediately afterwards*"—*Slander—New Trial for Insufficiency of Damages.*] In an action for slander a new trial will not be granted on the ground that the damages were insufficient, unless there has been a mistake in point of law on the part of the presiding judge, or a mistake in the calculation of figures or misconduct by the jury. A verdict having been given in an action for slander for 1*s.*, no application was made for a certificate under 3 & 4 Vict. c. 24, s. 2, that the injury was wilful and malicious until ten days afterwards at the next assize town. The judge then stated that he had been considering the matter, and granted the certificate:—*Held*, that the certificate was too late, and must be set aside.
FORSDIKE AND WIFE *v.* STONE 607

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5. COSTS—*County Courts Act*, 1867 (30 & 31 *Vict. c.* 142), *ss.* 5 *and* 6—*Statute of Gloucester* (6 *Edw.* 1, *c.* 1).] The Statute of Gloucester (6 Edw. 1, c. 1) gives to the plaintiff in an action a right to recover his costs if he obtain any damages. By various County Court Acts, and, in particular, 13 & 14 Vict. c. 61, s. 11, and 15 & 16 Vict. c. 54, s. 4, it was provided that the plaintiff should not recover his costs in certain cases, except under certain circumstances therein named. By the County Court Act, 1867 (30 & 31 Vict. c. 142), s. 33, all the provisions of previous County Court Acts with respect to costs are repealed. By s. 5, fresh provisions with respect to costs are enacted as to all actions commenced after the passing of the act. The act received the royal assent on the 20th of August, 1867, but by s. 36 it is provided that it shall come into operation on the 1st of January, 1868. An action of trespass in which questions of title were involved was commenced before the 20th of August, 1867, and a verdict was entered also before that date for the plaintiff, subject to a reference; the award was made after the 1st of January, 1868, and the arbitrator directed the verdict to stand for the plaintiff for 5*l.*; subsequently the plaintiff signed judgment, and obtained a judge's order for costs, and the master thereupon taxed his costs. On a motion to review the master's taxation:—*Held*, that the Statute of Gloucester had not been repealed as to the classes of cases in which, under the former County Court Acts, the plaintiff was entitled to his costs on obtaining a judge's order, or fulfilling the other conditions contained in those acts, but had as to those in which the plaintiff could in no way obtain his costs. That the effect of the County Court Act, 1867, was to remove all such conditions in the former classes of cases without imposing any fresh ones as to the actions commenced before the passing of that act. And that the plaintiff, therefore, was entitled to his costs under the Statute of Gloucester, independently of the judge's order.

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6. ——— under County Courts Act, 1867, s. 5 26
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7. ———, master's discretion as to taxation of 230
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8. ——— of judgment signed after bankruptcy, an order of discharge does not protect from arrest for, although the debt recovered in the action is proved under the bankruptcy 318
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9. ——— of the day, defendant not entitled to, when plaintiff has a reasonable excuse for not proceeding to trial 441
See PRACTICE. 3.

COUNTY COURT—*Jurisdiction—Friendly Society*—18 & 19 *Vict. c.* 63, *s.* 41.] By section 41 of the Friendly Societies Act, 1855 (18 & 19 Vict. c. 63), jurisdiction is given in certain cases to the county court of the district in which the usual or principal place of business of the society is situated:—*Held*, that the county court of any district in which any usual place of business of the society is situated, and not only that in which its principal place of business is situated, has jurisdiction under the act.

SHEA *v.* UNITED ASSURANCE SOCIETY OF ST. PATRICK 21

2. ———, *Practice—Attorney for the Party under* 15 & 16 *Vict. c.* 54, *s.* 10—*Retainer—Rule under* 19 & 20 *Vict. c.* 108, *s.* 43.] The 15 & 16 Vict. c. 54, s. 10, enacts that an attorney of a superior court, being an attorney acting generally in the action for the party, but not retained as advocate by the acting attorney, may appear for a suitor

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in the county court. Upon a motion under the 19 & 20 Vict. c. 108, s. 43, calling upon the judge to shew cause why he should not hear a duly qualified attorney :—*Held*, that it was for the judge to determine as matter of fact whether the applicant was or was not the attorney acting generally in the action for the party. *Semble*, that the fact of an attorney being clerk to another attorney, does not disqualify him from appearing for a suitor in the county court, provided he be the attorney acting generally in the action for the suitor.
IN THE MATTER OF A PLAINT IN THE COUNTY COURT OF KENT, BETWEEN BOOKHAM AND POTTER. EX PARTE ROGERS .. 490

COUNTY COURTS ACT, 1867 (30 & 31 VICT. c. 142), s. 5—*Costs*—The 5th section of the County Courts Act, 1867 (33 & 30 Vict. c. 142), provides "if in any action commenced after the passing of this act in any of her Majesty's superior courts of record, the plaintiff shall recover a sum not exceeding 20*l.* if the action is founded on contract . . . . he shall not be entitled to any costs of suit . . . . unless the Court or a judge at chambers shall, by rule or order, allow such costs." By the 36th section of the act, it is provided "this act shall come into operation on the first day of January next after the passing thereof." The act was passed on the 20th day of August, 1867 :—*Held*, that the 5th section does not come into force till after the first day of January, 1868.
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4. ——— between merchants and underwriters to hold the latter liable only for the share of the loss cast upon the owner of jettisoned goods in the general average statement is invalid 639
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DAMAGES, new trial not granted in action for slander, for insufficiency of 607
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3. ———, MEASURE OF: *See* MEASURE OF DAMAGES.

DEATH, suggestion of, of one of two defendants, practice as to 441
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DISCHARGE, order of, in bankruptcy, does not protect from arrest for costs of judgment signed after bankruptcy, although proof is made for the debt recovered in the action 318
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3. ———— of master, on taxation of costs, as to allowing expenses of a country attorney who attended a trial in London 320
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DUTY, a declaration is bad unless it discloses a breach of legal, to be observed towards the plaintiff 495
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EASEMENT of lateral support for sewers from adjacent land 612
See SEWERS.

ECCLESIASTICAL DILAPIDATIONS—*Waste—Injury to Glebe.*] The right of a rector to recover from the representatives of his predecessor, damages for waste, is confined to the case of dilapidations to houses and buildings, and does not extend to waste committed by digging gravel in the glebe.
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EJECTMENT, costs in, where plaintiff succeeds against several defendants, each defending for part only of premises claimed 22
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ESTATE TAIL, construction of devise giving 32
See CONSTRUCTION. 1.

EVIDENCE—*Stamp—Deed of Assignment under Bankruptcy Act*, 1861 —*Act of Bankruptcy—Notice of Act of Bankruptcy.*] A deed of assignment under the Bankruptcy Act, 1861, Sch. D, may be given in evidence as proof of an act of bankruptcy, though neither stamped nor registered; and notice of the execution of the deed is notice of an

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act of bankruptcy. H. being in difficulties, executed a deed in the form given in schedule D of the Bankruptcy Act, 1861. The deed was never stamped or registered. Immediately after its execution an attorney, acting both for H. and the trustees named in the deed, wrote to W., an auctioneer, informing him of the execution of the deed, and authorizing him to sell the goods of H. W. sold the goods, and, after the expiration of twenty-eight days, paid the proceeds to H. H. subsequently absconded, and was made a bankrupt. In an action by the assignee of H. under the bankruptcy against W. to recover the value of the goods, the deed was put in evidence, and its execution relied on as the act of bankruptcy:—*Held*, that the deed, being given in evidence for a collateral purpose, and not to give effect to it, as a valid instrument, was admissible, although not stamped or registered; that the act of bankruptcy was complete on the execution of the deed; and that therefore W. had notice of an act of bankruptcy. *Ex parte Wensley* (1 De G. J. & S. 273; 32 L. J. (Bk.) 23), followed. *Ex parte Potter* (34 L. J. (Bk.) 46), questioned.
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7. ————, what sufficient, of validity of deed under the Bankruptcy Act, 1861 458
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FACTORS ACTS—6 *Geo.* 4, *c.* 94, *and* 5 *&* 6 *Vict. c.* 39—*Authority of Factor to Pledge Goods—Revocation.*] An agent "intrusted with and in possession of" goods, or of the documents of title to goods, within the Factors Acts, is a person who is intrusted as agent for sale; and consequently one whose authority has been revoked cannot make a valid pledge of goods which had been intrusted to him for sale, but which he has wrongfully retained after his authority has been revoked, and the goods demanded.
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FALSE IMPRISONMENT—*Notice of Action—Larceny Act* (24 & 25 *Vict. c.* 96), *s.* 113—*Honest Belief.*] The defendant hearing at night a noise, and seeing a man at the back door of his house, believed that an attempt was being made to break into it, and, acting on that belief, and on his wife telling him that the plaintiff was the man, he gave the plaintiff, a respectable neighbour, who happened to be passing the front of the house at the time, into custody. In an action for this false imprisonment, the defendant pleaded not guilty by statute 24 & 25 Vict. c. 96, which by s. 113 requires, in actions for anything done in pursuance of the act, notice of action to be given:—*Held*, that an *attempt* to break into a house not being an offence within the act, the defendant did not believe in a state of facts, which, if it had existed, would have afforded a justification under the act, and was, therefore, not entitled to notice. *Semble*, that even an honest belief in a state of facts which, if true, would have afforded a justification, would not have been sufficient, unless the defendant had reasonable grounds for his belief. *Roberts* v. *Orchard* (2 H. & C. 769; 33 L. J. (Ex.) 65), explained.

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FRAUDS, STATUTE OF (29 CAR. 2, c. 3), s. 17—*Sufficient Memorandum—Ambiguity—Parol Evidence.*] On a purchase of flour, J. W., a duly authorized agent of the defendant, made the following entry in a book belonging to N.: "Mr. N., 32 sacks culasses at 39s., 280 lbs., to wait orders.—J.W." In an action by N. for the non-delivery of the flour, this entry was proved, and it was proved by parol evidence that N. was a baker, and the defendant a flour merchant; and a correspondence subsequent to the purchase was put in relating to the delivery of flour by the defendant to the plaintiff:—*Held*, that the above entry was a sufficient memorandum in writing of the contract to satisfy the Statute of Frauds: for that the parol evidence of the relative trades of the parties was admissible, and, independently of the correspondence, shewed that the defendant was the seller and the plaintiff the buyer of the flour. *Vandenbergh* v. *Spooner* (Law Rep. 1 Ex. 316), considered.

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GARNISHEE ORDER—*Common Law Procedure Act*, 1854 (17 & 18 *Vict. c.* 125), *s.* 65—*Payment into Court.*] Payment into court by a garnishee under a judge's order, is a payment within the meaning of the Common Law Procedure Act, 1854, s. 65, and discharges the

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garnishee: and the subsequent execution of a composition deed by the debtor will not prevent the creditor being entitled to the money so paid into court. A. having signed judgment against B. (a solicitor), obtained a garnishee order against C. who owed B. a bill of costs; C. obtained further time for taxing the bill on payment into court of 25*l*. B. subsequently, and before the taxation was complete, executed a composition deed, and gave notice to C. not to pay the amount of the bill to A. The bill when taxed was found to exceed 25*l*. On an application by C. for the repayment to him out of court of the 25*l*.:—*Held*, that the payment into court was within the 65th section of the Common Law Procedure Act, 1854, and discharged C. as against B., and that A. was entitled to the 25*l*.
CULVERHOUSE *v.* WICKENS. CLARK, Garnishee 295

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HIGHWAY—*Vestry—Liability for omitting to Repair a Road—Metropolis Local Management Act* (18 & 19 *Vict. c.* 120), *ss.* 96, 98.] An action for the non-repair of a highway will not lie against a vestry appointed under the Metropolis Local Management Act (18 & 19 Vict. c. 120).
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LANDLORD AND TENANT—*Demise of portion of Room in Factory, with Steam-power—Creditors' deed—Bankruptcy Act*, 1861 (24 & 25 *Vict. c.* 134), *s.* 197—*Bankrupt Act*, 1849 (12 & 13 *Vict. c.* 106), *s.* 149.] A. let to B. a defined portion of a room in a factory, with steam-power for working lace-machines belonging to B., at a certain sum per annum, payable quarterly; a deduction to be allowed in the event of hindrances in the supply of power beyond seven days in each quarter:—*Held*, a sufficient demise to entitle A. to distrain. By a deed (duly registered) in the form given in Schedule D. to the Bankruptcy Act, 1861, to which the required majority of the creditors assented, B. assigned all his effects to a trustee, "to be applied and administered for the benefit of the creditors in like manner as if B. had been at the date thereof duly adjudged a bankrupt:"—*Held*, that the title of the trustee, under s. 197 of that act, dated from the *execution* of the deed; and that a distress for rent levied between that time and the day of registration could not, by reason of s. 129 of the Bankrupt Act, 1849, be made available for more than one year's rent. *Williams* v. *Cadbury* (Law Rep. 2 C. P. 453), distinguished.
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LETTERS-PATENT—*Construction of Grant of Licence—Notice of Infringement—Suspension of Royalties.*] The plaintiff, being possessed of a patent, granted to the defendants the exclusive licence to work it in a certain district, by a deed by which the latter covenanted to pay certain royalties, and to give every information the better to enable the patentee to support the letters-patent; and the patentee covenanted for quiet enjoyment of the patent by the defendants, and that, "in case any person should work the patented processes, the patentee would at his own costs commence and carry on all such actions, &c., as should be necessary to establish the validity of the patent, and to put a stop to the working of the patented processes by such person; and that, in case the patentee should fail or neglect so to establish or maintain the validity of the patent, and to put a stop to the working of the patented processes by such other person, he (the patentee) would not call upon the defendants, nor should the defendants be liable thenceforth to pay any royalty, until the patentee should by authority of law or otherwise have restrained such person from working under the letters-patent:"—*Held*, that the condition for suspension of payment of the royalties did not come into operation until the patentee had notice of an infringement, and until after the lapse of a reasonable time to allow him an opportunity of instituting proceedings to restrain it.
HENDERSON *v.* THE MOSTYN COPPER COMPANY, LIMITED .. 202

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See MEASURE OF DAMAGES.

MANDAMUS—*Notice to Treat—Land Clauses Consolidation Act* (8 & 9 *Vict. c.* 18), *s.* 18—27 & 28 *Vict. c. cccxv. s.* 13.] The Metropolitan Railway (Tower Hill Extension) Act (27 & 28 Vict. c. cccxv.), by s. 2, incorporates the Lands Clauses Consolidation Act, and by s. 13 provides that the company, before they enter upon or take any tenement under the powers of the act, shall give six months' notice of their intention to take such tenement to the person rated to the poor in respect of it. The Lands Clauses Consolidation Act (8 & 9 Vict. c. 18), s. 18, provides that the promoters of the undertaking shall give notice of their intention to take lands to all parties interested

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in them, and that such notice shall contain certain particulars. The Metropolitan Railway Company gave a notice to the plaintiff of their intention to take a tenement for which he was rated to the poor; the notice did not contain the particulars mentioned in s. 18 of the Lands Clauses Consolidation Act. In consequence of this notice the plaintiff took other premises, and his former ones remained on his hands unoccupied. The company having failed to proceed with the purchase of the lands after six months had elapsed, the plaintiff commenced an action against them for damages, and claimed a mandamus:—*Held*, that the notice bound the company to proceed with the purchase of the tenement at the end of the six months, and that the plaintiff was entitled to a mandamus to compel them to do so. *Held* also, that he was entitled to more than nominal damages. Per Bovill, C.J. The notice, as against the company, was a sufficient compliance with the provisions of s. 18 of the Lands Clauses Consolidation Act.

MORGAN AND ANOTHER *v.* THE METROPOLITAN RAILWAY COMPANY 553

MARGINAL NOTE to a statute is no part of the statute itself, and is not binding as a construction of the sections 511

See VENDOR AND PURCHASER. 2.

MARINE INSURANCE—*Valued Time Policy—Estimated Value—Mistake.*] The value of the ship insured, stated in a valued time policy, is, in the absence of fraud, conclusive between the parties, however largely in excess of the true value. A ship was insured by a valued time policy, and its value stated in the policy was 8000*l.* At the time the policy was made, but unknown to the parties, the ship had been injured in a storm, so that the expense of the repairs would have exceeded its value when repaired. During the continuance of the risk the ship was totally lost. In an action against the underwriters:—*Held*, that the policy attached, notwithstanding the previous injury to the ship, and that, there being no fraud, the value of the ship as stated in the policy was conclusive between the parties.

BARKER AND ANOTHER *v.* JANSON 303

2. ——————, *Jettison—General average Contribution, how estimated.*] In ascertaining the general average contribution to be paid by the shipowner in respect of goods jettisoned, the value of such goods is to be taken to be the sum which it may fairly be assumed they would have been worth to the owner at the port of adjustment. If, from the circumstances, and the damaged condition of the rest of the cargo, it may fairly be assumed that the jettisoned goods would, if they had not been thrown overboard, have arrived in the like damaged condition, their value is to be taken to be the sum they would have realized as damaged goods. A ship sailed from Liverpool for Calcutta with 2000 tons of salt on board, all belonging to one merchant. The day after she sailed, the ship struck on a bank on the Irish coast, and, after throwing overboard 1000 tons of the salt, was got off and put back to Liverpool, where the remainder of the cargo was unloaded and found to be all (with the exception of about 100 tons) so damaged as to be nearly unfit to be forwarded, and worthless. The charterer had paid 1250*l.* in advance for freight. In an action by the owner against an underwriter on the ship, to recover a general average contribution in respect of the salt so jettisoned, upon a case stated for the opinion of the Court as to the principle by which the average-stater was to be guided in ascertaining the value of the jettisoned goods:—*Held*, that, in ascertaining the contribution to be paid by the ship-owner to the owner of the cargo, in respect of the salt jettisoned, it was to be valued at the price which it would have been worth at Liverpool had it been brought back there,—the average-stater taking

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into account the probability of its arriving at the port of adjustment in a sound or a damaged state, or in a state in which it could have been forwarded, so as to take advantage of the pre-paid freight.

FLETCHER *v.* ALEXANDER 375

3. MARINE INSURANCE—*Ship and Shipping—Total or Partial Loss—Obliteration of Marks by Sea Perils—Goods insured not distinguishable from other similar Goods on Board—Confusio—Commixtio.*] Cotton belonging to different owners was shipped in bales specifically marked, at Mobile for Liverpool: 43 bales belonged to the plaintiffs, and were insured by the defendants against the usual perils. In the course of her voyage the ship was wrecked near Key West; all the cotton was more or less damaged; some of it was lost, and some was so damaged that it had to be sold at Key West. The rest of the cotton was conveyed in another vessel to Liverpool. The marks on a very large number of the bales were so obliterated by sea-water that none of the cotton lost or sold at Key West, and a portion only of that carried to Liverpool, could be identified as belonging to any particular consignee. Two only of the plaintiffs' 43 bales were identified, and these were delivered to the plaintiffs:—*Held*, that in respect of the cotton lost, and that sold at Key West, there was a total loss of a part of each owner's cotton, and that all the owners became tenants in common of the cotton which arrived at Liverpool, and could not be identified; the share of each owner's loss in the cotton totally lost or sold at Key West, and his share in the remainder which arrived at Liverpool being in the proportion that the quantity shipped by him bore to the whole quantity shipped according to the rule in cases of general average where it is not known whose goods are sacrificed: and, consequently, that there was no total loss, either actual or constructive, of the plaintiffs' 41 bales.

SPENCE AND ANOTHER *v.* THE UNION MARINE INSURANCE COMPANY, LIMITED 427

4. ——————, *Policy on Freight—Notice of Abandonment.*] The plaintiff, owner of a vessel chartered to sail from Glasgow to New Zealand with cargo and there discharge, thence to proceed to Calcutta and load cargo and therewith proceed to London, effected a policy on the chartered freight from Calcutta to London, to attach only during the preliminary voyage to New Zealand. The vessel received injuries on its voyage to New Zealand, which would have justified abandonment or sale, but neither took place within a reasonable time, and the plaintiff partially repaired the vessel at New Zealand, and sailed it to Calcutta. No notice of abandonment of the freight was given within a reasonable time:—*Held*, that there was neither an actual nor a constructive total loss of the freight.

POTTER *v.* RANKIN 562

5. ——————, *Collision Clause—Suing and Labouring Clause—Cost of Defending an Action—Liability of Underwriters.*] A Lloyd's policy in the usual form on the plaintiff's vessel was made, "subject to the running down clause as per slip attached." By that clause the assurers agreed that if the plaintiff became liable to pay and paid *as damages* for running down any other ship any sum not exceeding the value of the insured vessel, they would repay to the plaintiff a certain proportion of such sum. The vessel insured having run down another, and the plaintiff having successfully defended an action brought against him in respect of the injury:—*Held*, that he was not entitled to recover any portion of the costs of the defence, either under the suing and labouring clause, or the running down clause.

XENOS *v.* FOX 630

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6. MARINE INSURANCE — *Jettison — General Average—Liability of Underwriters.*] A. insured goods at Canton by a policy which included jettison among the perils insured against. The goods were jettisoned under circumstances which entitled A. to a general average contribution from the owners of the ship and of the rest of the cargo, which arrived safely at London, the port of discharge. A. having sued the underwriters for the whole amount insured, without having first collected the contributions to which he was entitled from the other owners of the ship and cargo:—*Held*, that he was entitled to recover; and that the underwriters, having paid him, would be then entitled to stand in his place with respect to the general average contribution:—*Held*, also, that the liability of the underwriters under the policy could not be varied by a custom, alleged to exist in the port of London between merchants and underwriters, to hold the latter liable only for the share of the loss cast upon the owner of jettisoned goods in the general average statement.

DICKENSON AND OTHERS *v.* JARDINE AND OTHERS 639

MASTER, discretion of, as to taxation of costs 230, 320
See PRACTICE. 1. COSTS. 3.

2. ———, practice as to giving security to the satisfaction of 453
See SHERIFF. 1.

MASTER AND SERVANT—*Negligence of Servant—Scope of Employment—Notice of Action under the Metropolitan Management Amendment Act*, 1862 (25 & 26 *Vict. c.* 102), *s.* 106.] The defendant, a contractor under a district board, was engaged in constructing a sewer, and employed men with horses and carts. The men so employed were allowed an hour for dinner, but were not permitted to go home to dine or to leave their horses and carts. One of the men went home about a quarter of a mile out of the direct line of his work to his dinner, and left his horse unattended in the street before his door. The horse ran away and damaged certain railings belonging to the plaintiff:—*Held*, that it was properly left to the jury to say whether the driver was acting within the scope of his employment, and that they were justified in finding that he was. *Held*, also, that the thing complained of was not a thing done or intended to be done under the powers of the board, or under the act, so as to entitle the defendant to a notice of action under s. 106 of the 25 & 26 Vict. c. 102.

WHATMAN *v.* PEARSON 422

MATE, seaman appointed on death of master by first mate to be second, entitled to pay of second mate 47
See SHIP AND SHIPPING. 2.

MAYOR'S COURT—*Attachment — Equitable Assignment of Railway Shares—Notice to Garnishee.*] A prior equitable assignment of railway shares in the hands of the garnishee, is a bar to an attachment from the Mayor's Court, London, notwithstanding that no notice of such assignment has been given to the garnishee.

CROW AND ANOTHER, Approvers; ROBINSON, Plaintiff; REEVES AND ANOTHER, Garnishees; NESBITT, Defendant 264

MEASURE OF DAMAGES—*Carrier—Non-Delivery—Loss of Profits—Ship and Shipping—Delivery of Goods on board.*] The plaintiffs delivered to the defendant's servants on a quay at Glasgow, for shipment on board the defendant's vessel which lay alongside, several cases containing machinery, which was intended for the erection of a sawmill at Vancouver's Island. The master gave a bill of lading for them, describing the cases as containing "merchandize." The defendant knew generally of what the shipment consisted. On the arrival of the vessel at her destination, one of the cases, which contained

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machinery without which the mill could not be erected, could not be found on board; and the plaintiffs were obliged to send to England to replace the lost articles:—*Held*, that the defendant was liable for the loss of the machinery, as delivery to the defendant's servants alongside the vessel was equivalent to a delivery on board. *Held* also, that the measure of damages for the breach of contract was, the cost of replacing the lost articles in Vancouver's Island, with interest at 5 per cent. upon the amount until judgment, by way of compensation for the delay.

THE BRITISH COLUMBIA AND VANCOUVER'S ISLAND SPAR, LUMBER, AND SAW-MILL COMPANY, LIMITED, *v.* NETTLESHIP 499

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METROPOLIS MANAGEMENT ACT, 1855, s. 105, deductions from rent on account of payments assessed upon premises under .. 144, 149
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2. ——————————, 1862, s. 106, notice of action under 22
See MASTER AND SERVANT.

METROPOLIS MANAGEMENT AMENDMENT ACT, 1862 (25 & 26 VICT. c. 102), s. 106—*Limitation of Action—Claim of Compensation for Injury to Property.*] By s. 106 of the Metropolis Management Amendment Act, 1862, no action or proceeding shall be commenced against the Metropolitan Board of Works for anything done or intended to be done under the powers of that board, under certain statutes, until after one month's notice, and "every such action and proceeding shall be brought or commenced within six months next after the accrual of the cause of action, or ground of claim or demand, and not afterwards":—*Held* (affirming the judgment of the Court of Common Pleas), that notice of claim and demand of arbitration for damage done to buildings by the Metropolitan Board of Works, acting under their statutory powers, is not such a proceeding against the Metropolitan Board of Works as to render it necessary that it should be made within six months after the damage is caused.

DELANY AND ANOTHER *v.* THE METROPOLITAN BOARD OF WORKS .. .. (Ex. Ch.) 111

2. ——————————, s. 96—*Right of Tenant to deduct from his Rent Payments of Money assessed upon the Premises for Works done under the 105th section of the Metropolis Management Act*, 1855 (18 & 19 *Vict.* c. 120)—*Landlord and Tenant.*] By s. 96 of the Metropolis Management Amendment Act, 1862, the owner shall allow the occupier to deduct out of the rent from time to time becoming due in respect of the premises the sums of money which the occupier pays to the vestry or district board for works done by them under the act:—*Held*, that, to entitle the occupier to avail himself of that provision, the money must have been actually paid; and, consequently, that a distress, for

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rent which became due after service of a notice from the vestry, made before payment to the vestry-clerk, is not illegal.
RYAN *v.* THOMPSON 144

3. METROPOLIS MANAGEMENT AMENDMENT ACT, 1862 (25 & 26 VICT. c. 102), s. 96.] *Assessment in Respect of Works done under s.* 105, *of Metropolis Management Act*, 1855 (18 *&* 19 *Vict. c.* 120)—*Landlord and Tenant—Construction of Covenant to pay all Taxes, &c., in respect of the Premises.*] By indenture of lease the lessee covenanted that he would during the continuance of the term pay and discharge "all taxes, rates, duties, and assessments whatsoever which during the continuance of the demise should be taxed, assessed, or imposed on the tenant or landlord of the premises demised in respect thereof," &c. The vestry of the parish having, under the provisions of the Metropolis Management Acts paved the street upon which the demised premises abutted, assessed the sum payable by the owner as his proportion of the estimated expenses thereof at 49*l.* 2*s.* 6*d.*, gave the occupier a notice under s. 96 of the act of 1862 requiring him to pay it, and, upon his failure to do so, took proceedings against the owner before a magistrate, and compelled him to pay:—*Held*, that this was a "duty" or "assessment" assessed or imposed upon the owner in respect of the premises, within the covenant.
THOMPSON *v.* LAPWORTH 149

4. ——————————————————————, s. 98 —*New Street.*] Section 98 of the Metropolis Management Amendment Act, 1862, provides that no existing roadway of a width less than 40 feet shall be laid out for building as a street for carriage traffic, unless such road be widened to the width of 40 feet, taken half on either side of the centre of the roadway. The respondent was the owner of land upon which he had in 1866 erected some houses, the gardens in the rear of which abutted upon an ancient lane, and some of the owners of land adjoining this lane had in 1867 begun to form it into a street for carriage-traffic, within the meaning of s. 98 of the Metropolis Management Amendment Act, 1862. The respondent himself had done no act towards forming or laying out the lane as a street for the purposes of carriage-traffic, otherwise than by the removal in 1866 of an old bank and thorn fence and the substitution of an oak fence three feet within his own land, nor had he any intention of doing any such act, or of putting up any building fronting towards the lane:—*Held*, that he had not committed any offence against the act: and was not bound to set back his oak fence, so as to leave a space of 20 feet between it and the centre of the lane.
THE METROPOLITAN BOARD OF WORKS, Appellants; CLEVER, Respondent 531

METROPOLITAN BOARD OF WORKS, right of, to lateral support for sewers from adjacent land 612
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METROPOLITAN RAILWAY ACT, s. 104, construction of 612
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MUTUAL CREDIT, what is, in bankruptcy 444
See BANKRUPTCY. 3.

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NEGLIGENCE—*Railway Company—Absence of due Precaution.*] In order to charge a railway company or other carrier of passengers with negligence, it is necessary to shew circumstances from which it may fairly be inferred that the accident complained of resulted from the want of some precaution which the defendants might and ought to have taken; and also to shew with reasonable certainty what particular precaution had not been taken. The plaintiff, while travelling by the defendants' railway, was injured by the fall of an iron girder, through the negligence of the workmen employed by a contractor in placing it across the retaining walls of the railway. It was proved that the work in question was extremely dangerous, and that it was the practice when such work was being done across railways, for the company to place a man to signal to the workpeople the approach of a train. This precaution was not adopted:—*Held*, sufficient to warrant a jury in finding that the defendants were guilty of negligence. [*Reversed on appeal*, 591. *See next case inf.*]
DANIEL *v.* THE METROPOLITAN RAILWAY COMPANY 216

2. ————, *Appeal under Common Law Procedure Act*, 1854 (17 & 18 *Vict. c.* 125), *ss.* 34, 35—*Court to draw Inferences—Negligence—Railway Company—Absence of due Precaution.*] A verdict was entered for the plaintiff, by consent, subject to leave reserved to the defendants to move to set it aside, and instead thereof to enter a verdict for them, or a nonsuit, on the ground that there was not sufficient evidence of negligence to support the plaintiff's case,—the Court to be at liberty to draw inferences of fact, and to adjudge upon the evidence. Upon appeal to the Exchequer Chamber, under the Common Law Procedure Act, 1854, ss. 34, 35, the evidence being set out in the case,—*Held*, that the Court of error were to find such a verdict as in their judgment a jury ought upon the evidence to have found. The plaintiff, while travelling by the defendants' railway, was injured by the fall of a girder, through the negligence of the workmen employed by a contractor (unconnected with the defendants) whilst placing it across the retaining walls of the railway. It was proved that the work in question was extremely dangerous, though none of the witnesses had ever known of a girder falling; that it was the practice, when such work was being done over railways, for the company to place a man to signal to the work-people the approach of a train; and that this precaution was not adopted on the occasion in question; but there was no evidence that the company's servants knew that the girder was in the course of being moved at the time the train was passing, or of the means used by the contractor for moving it:—*Held*, upon a case in which the Court were to be at liberty to draw inferences of fact,—reversing the decision of the Court of Common Pleas,—that as a fact the defendants were not guilty of negligence, although the evidence of negligence was such that it could not have been withdrawn from the jury. [*See preceding case.*]
DANIEL *v.* THE METROPOLITAN RAILWAY COMPANY .. (Ex. Ch.) 591

3. ————, *Duty of Dock Company to Persons doing business on board Ships in the Dock.*] The defendants, a dock company, provided gangways from the shore to the ships lying in their dock, the gangways being made of materials belonging to the defendants and managed by their servants. The plaintiff went on board a ship in the dock at the invitation of one of the ship's officers and, while he

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was on board, the defendants' servants, for the purposes of the business of the dock, moved the gangway, so that it was, and to their knowledge, insecure. The plaintiff, in ignorance of its insecurity, returned along it to the shore, the gangway gave way, and he was injured:—*Held*, that there was a duty on the defendants towards the plaintiff to keep the gangway reasonably safe, and that he was entitled to recover damages from them for the injuries he received.
SMITH *v.* LONDON AND SAINT KATHARINE DOCKS COMPANY .. 326

4. NEGLIGENCE—*Railway Company—Contributory Negligence.*] The plaintiff, a passenger by the defendants' railway, was in the act of getting into a third-class carriage at a station, the train not being in motion. Having a parcel in his right hand, he placed his left hand on the back of the open door to aid him in mounting the step. Before he had completely entered the carriage, the guard, without any previous warning, forcibly closed the door, and crushed the plaintiff's hand between the door and the door-post. In an action for the injury thus sustained:—*Held*, by Byles and Keating, JJ., that the jury were justified in finding, in favour of the plaintiff, that the guard was guilty of negligence; and that there was no evidence of contributory negligence on the part of the plaintiff. *Held*, by Montague Smith, J., that, by putting his hand in the position he did, knowing that the door was about to be closed, the plaintiff was guilty of negligence which contributed to the injury, and therefore was not entitled to recover.
FORDHAM *v* THE LONDON, BRIGHTON, AND SOUTH COAST RAILWAY COMPANY 368

5. ————————, *Breach of Duty—Statement of Cause of Action—Pleading.*] Declaration that the defendant wrongfully, negligently, and improperly hung a chandelier in a public-house, knowing that the plaintiff and others were likely to be therein and under the chandelier, and that the chandelier unless properly hung was likely to fall upon and injure them; and that, the plaintiff being lawfully in the public-house, the chandelier fell upon and injured him:—*Held*, on demurrer, that the declaration was bad, as it did not disclose any duty by the defendant towards the plaintiff for the breach of which an action could be maintained.
COLLIS *v.* SELDEN 495

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OBJECTION, notice of, to borough vote signed by stamp is good 28
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OYSTER FISHERY, licence to dredge in 575
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PARLIAMENT—*Borough Vote—Notice of Objection—Signature of Objector—Stamp*—6 *Vict. c.* 18, *s.* 17.] An objector affixed his name to the notice of objection by means of a stamp on which was engraved a fac-simile of his ordinary signature:—*Held*, that the notice was "signed by the person objecting," within the 17th section of the 6 Vict. c. 18.
BENNETT, Appellant; BRUMFITT, Respondent 28

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POOR-RATE—*Representation of the People Act*, 1867 (30 & 31 *Vict. c.* 102), *Construction of s.* 7—*House wholly let out in Apartments not separately rated.*] By the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), s. 7, where the owner is rated at the passing of this Act to the poor-rate in respect of a dwelling-house situate in a parish wholly or partly within a parliamentary borough, instead of the occupier, his liability to be rated for the future shall cease; and after the passing of this act no owner of any dwelling-house so situate shall be rated to the poor-rate instead of the occupier, except as hereinafter mentioned. . . . When the dwelling-house shall be wholly let out in apartments or lodgings, not separately rated, the owner of such dwelling-house shall be rated to the poor-rate. The appellant and five other persons each occupied a room in a six-roomed dwelling-house in a parish within a parliamentary borough, and had the use in common of the street-door, passage, staircase, and domestic conveniences; the owner did not occupy any part of the premises, nor retain any control over the tenants, each of whom had the exclusive possession of his own room. At the time of the passing of The Representation of the People Act, 1867, the owner was rated in respect of the whole house, instead of the occupiers, by virtue of the Small Tenements Act, 13 & 14 Vict. c. 99. After the passing of The Representation of the People Act, the overseers of the parish made a rate, in which each of the six occupiers was separately rated:—*Held*, that the *owner* of the house, and not the several occupiers, was rateable: for that the house came within the exception in s. 7.
STAMPER, Appellant; THE OVERSEERS OF SUNDERLAND-NEAR-THE-SEA, Respondents 388

PRACTICE—*Undertaking on Refusal of Order—Drawing up Judge's Order—Costs, Taxation of—Master's Discretion.*] A summons to change the venue from London to Newcastle being opposed by the plaintiffs, the judge indorsed the summons, "No order; the plaintiffs undertaking to tax, if successful, as if tried in Northumberland:"—*Held*, that this was binding upon the plaintiffs as an undertaking, though no order was ever drawn up. The cause was in the paper six days, and was tried on the fifth and six days, when the plaintiffs had a verdict. On taxation, the master allowed only two days' attendance of the plaintiffs' attorney and witnesses, considering that their detention would not have exceeded that space of time if the cause had been tried at Newcastle. He also refused to allow the estimated cost of a journey from London to Newcastle of two witnesses (residents of South Shields), who happened to be near London at the time of the trial. He further disallowed detention money to witnesses

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whose ordinary place of abode was Newcastle or the neighbourhood, upon the presumption that they would probably have been at home at the assize time:—*Held*, that these were matters for the master's discretion, and that he had not so plainly and obviously erred as to induce the Court to interfere.

CLARKE AND OTHERS *v.* THE TYNE IMPROVEMENT COMMISSIONERS 230

2. PRACTICE—*Common Law Procedure Act*, 1852 (15 & 16 *Vict. c.* 76), s. 101—*Enlargement of Time.*] By the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 101, it is provided that where any issue is joined in any cause the defendant may in the cases therein provided, give twenty days' notice to the plaintiff to bring the issue on to be tried at the sittings next after the expiration of the notice; and if the plaintiff neglects to proceed to trial in pursuance of such notice, the defendant may enter a suggestion and sign judgment for his costs, provided that the Court or a judge shall have power to extend the time for proceeding to trial with or without terms:—*Held*, that under the above section the Court or a judge can, after the twenty days have already expired, extend the time for proceeding to trial.

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3. ————, *Costs of the Day—Suggestion of Death of one of two Defendants*—15 & 16 *Vict. c.* 76, *s.* 99.] Where a plaintiff has a reasonable excuse for not proceeding to trial pursuant to notice, and has been guilty of no default, the defendant is not entitled to costs of the day, under s. 99 of the Common Law Procedure Act. 1852. In an action against A. and B., notice of trial was given for the Bristol assizes, which commenced on the 13th of August. On the 10th, Saturday, the plaintiff's attorney became aware that B. was dead. No suggestion was entered on the record, and on the 12th the plaintiff gave a notice by telegram that he did not mean to try at those assizes. Notwithstanding this notice, A. attended with his witnesses at Bristol. The plaintiff did not appear:—*Held*, that the plaintiff had not been guilty of such default as to entitle A. to costs of the day. *Semble*, that a suggestion of B.'s death might have been entered by either party.

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9. ———— in giving security to the satisfaction of the master .. 453
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10. ———— in county court as to advocacy by attorneys 490
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PRESCRIPTION—*Reasonableness of Fee—Oyster Fishery—Licence to Dredge.*] The mere circumstance of the owners of an oyster fishery having for a period of one hundred and fifty years received a fee of 2*l.* 2*s.* for a licence for four dredges, will not, in the absence of all evidence on the subject, warrant the assumption that 3*l.* 3*s.* is an unreasonable sum to demand for such a licence.
MILLS *v.* THE MAYOR, &C., OF COLCHESTER .. (EX. Ch.) 575

2. ————————, *Anchorage-due, what will sustain a Claim for—Antient Port.*] An oyster-fishery had been possessed and an anchorage-due claimed and received from time immemorial by the lords of the manor of Whitstable in respect of all vessels casting anchor within the limits of certain anchorage-ground within the manor. The anchorage was natural holding ground, with natural breakwaters. In 1795, the fishery and the soil (including the anchorage-ground) were conveyed by the lord, with all its rights and appurtenances, to the plaintiffs, who thenceforth claimed and received the anchorage-dues. There was some evidence that Whitstable was a limb of the port of Sandwich; but there was no direct evidence to shew that the anchorage-ground was within or connected with the port, or that the franchise of the port was ever granted out by the Crown. There was, however, evidence that the lord of the manor was the owner of a landing-place called Le Craston, within the limits of the manor, but its precise position could not now be ascertained, and that he took toll upon merchandize landed there, and also that he was owner of the anchorage-ground, and took the anchorage-due as such lord and owner of the soil. The recitals in an act of parliament by which the plaintiffs were incorporated and impowered to purchase the manor and manorial rights, stated that there were "customary payments usually and of right made to the lord of the manor for or in respect of any ship or vessel on the landing of goods or merchandize within the said manor." There was also evidence that the plaintiffs had as far back as living memory extended maintained buoys and beacons, which served the double purpose of pointing out the channel by which vessels of small burthen might safely reach the anchorage-ground and also of protecting the oyster-beds:—*Held* (affirming the judgment of the Court of Common Pleas), by Kelly, C.B., Channell, B., Blackburn and Mellor, JJ., upon a special case reserving power to the Court to draw all inferences of fact, that the maintenance of the buoys and beacons, taken in connection with the ownership of the soil of the anchorage-ground, and the benefit to the public therefrom, afforded a sufficient consideration to sustain the claim to the anchorage-due. *Held*, by Martin and Bramwell, BB., that assuming Whitstable to be an antient port, the facts stated did not justify the inference that there was any consideration to sustain the claim of anchorage.
THE FREE FISHERS OF WHITSTABLE *v.* FOREMAN .. (EX. Ch.) 578

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3. PRINCIPAL AND AGENT, usage in wool trade in Liverpool, that a broker may contract either in his own or in his principal's name, is a good custom 194
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QUALIFICATION of directors, construction of articles of association as to 484
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RAILWAY COMPANY—*Compensation for Lands "injuriously affected," within the Lands Clauses Consolidation Act*, 1845 (8 *Vict. c.* 18), *s.* 68, *and Railways Clauses Consolidation Act*, 1845 (8 *Vict. c.* 20), *ss.* 6, 16.] To entitle a claimant to compensation under the Lands Clauses Consolidation Act, and Railway Clauses Consolidation Act, 1845, he must shew that he has sustained a particular damage from the execution by the company of the works authorized by the special act, and that the damage is one for which he might have maintained an action if the work had not been authorized by parliament; and, further, that the injury of which he complains is an injury to his estate, and not a mere obstruction or inconvenience to him personally or to his trade, although it might have been the subject of an action if the works which occasioned it had not been executed under the sanction of parliament. And the damage must be one which is sustained in respect of the property itself, and not in respect of any particular use to which it may from time to time be put. The plaintiff was possessed of a house fronting on a public highway. The defendants, a railway company, under the powers conferred upon them by their special act, erected an embankment on a portion of the highway opposite to the plaintiff's house, thereby narrowing the road from fifty to thirty-three feet, and thus, according to the evidence, materially diminishing the value of the house for selling or letting, and obstructing the access of light and air to it:—*Held*, that this was such a permanent injury to the estate of the plaintiff in the premises as to entitle him to compensation under the Lands Clauses Consolidation Act, and Railways Clauses Consolidation Act, 1845. *Rickett* v. *Metropolitan Railway Company* (Law Rep. 1 H. L. 175), observed upon and distinguished.
BECKETT *v.* THE MIDLAND RAILWAY COMPANY 82

2. ——————————, *Certificate of Engineer for Work done, &c. Assignment of a Call not yet payable—Power of Sale—Notice of Assignment to the Shareholder—Garnishee Order under the Common Law Procedure Act*, 1854, *ss.* 61, *et seq.*] The defendants signed judgment against a railway company on the 9th of February, 1866, and on the 31st of July obtained a garnishee order nisi under the Common Law Procedure Act, 1854, whereby it was ordered that all debts due and owing or accruing due from Lord P., a shareholder in

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the company, should be attached to answer the judgment. On the 12th of May, the plaintiffs (the contractors for the line) received from the company's engineer a certificate in the form agreed on by the company, that 96,200*l.* was due to them for work done and materials supplied under the articles of agreement, one of the clauses of which authorized the engineer from time to time to "ascertain the extent and value of the works then executed and the materials then provided for the works by the contractors." Of this a sum of 11,000*l.* represented materials provided for, but not actually affixed to, the line. On the 4th of June, 1866, the company issued to the plaintiffs paid-up shares to the amount of 56,200*l.* in part satisfaction of the sum so certified to be due. On the 11th of June they made a call of 5*l.* per share, payable on the 14th of July; and on the 13th of July they, by a deed reciting that they were indebted to the plaintiffs in 40,000*l.*, assigned the call to them by way of security, with a power of sale at any time after the 13th of October. Before the garnishee order was made absolute, the plaintiffs claimed from Lord P. 1000*l.*, being the amount of the call due upon 200 shares held by him; and the judge directed an issue, to try the validity of the assignment. Lord P. had no actual notice of the assignment, but he was present as a director at the board meetings at which it was resolved that the assignment should be made:—*Held*, that it was competent to the company's engineer to certify for "materials;" that the company might properly assign the call as security for a bonâ fide debt, though the time for payment of the call had not yet arrived; that the assignment was not rendered invalid by the power of sale, inasmuch as the exercise of that power might be restrained by injunction, or that part of the deed rejected; and that, if notice were necessary in such a case (which the Court inclined to think it was not), Lord P. had such knowledge of the assignment as amounted to notice. *Watts* v. *Porter* (3 E. & B. 743; 23 L. J. (Q.B.) 345), questioned.

PICKERING AND ANOTHER *v.* THE ILFRACOMBE RAILWAY COMPANY 235

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ROAD: *See* HIGHWAY.

SALE of public house, construction of contract for 511
See VENDOR AND PURCHASER. 2.

SALMON FISHERY ACTS (24 & 25 VICT. c. 109; 28 & 29 VICT. c. 121)—*Prescription—Right to use fixed Engines.*] A., being a lord of the manor of H., claimed to be entitled, within the provisions of the Salmon Fishery Acts (24 & 25 Vict. c. 109; 28 & 29 Vict. c. 121), to use reasonable fixed engines in the river R. in reasonable places within the manor of H. In support of the claim he produced certain old documents shewing that there had been a fishery from the earliest times in that part of the river R. He also gave evidence to shew that for many years previous to the year 1844 fixed engines had been used in various hollows formed in the sands of the river. That at that time a wall was built to improve the navigation under an act of parliament, by which the rights of all lords of manors were expressly saved, and that through the building of the wall the bed of the river was changed, and convenient hollows for placing the engines were formed close to the wall. That previous to the year 1844 the engines were never placed nearer than 200 yards to the place where the wall now stands, but it did not appear whether there were then any hollows worth fishing within that distance. That since that time the fixed engines had been placed in hollows close to the wall, and had never been placed on the sites where they had been used previously to 1844. In a case stated by the commissioners for the opinion of the Court whether they were bound as matter of law to find that the claimant was entitled to use the fixed engines as claimed:—*Held*, that it was a mixed question of fact and law whether the using the engines in places since 1844 different from those in which they had been used previously amounted to an enhancement of the engines, and that the commissioners were not, therefore, bound as *matter of law* to find that the claimant was so entitled.
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SEWERS—*Easement—Right to Lateral Support—Metropolitan Board of Works*—11 & 12 *Vict. c.* 112—18 & 19 *Vict. c.* 120—*Metropolitan Railway Company*—17 & 18 *Vict. c. ccxxi.*] A sewer made by the Metropolitan Commissioners of Sewers under the powers vested in them by 11 & 12 Vict. c. 112, was transferred to the Metropolitan Board of Works by 18 & 19 Vict. c. 120:—*Held*, by Bovill, C.J., and Byles, J. (Montague Smith, J., dissenting), that these Acts gave the board no right to any lateral support for the sewer by the land of the adjacent owners.
THE METROPOLITAN BOARD OF WORKS *v.* THE METROPOLITAN RAILWAY COMPANY 612

SHAREHOLDER of company, Court has a discretion as to allowing a scire facias to issue against 80
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SHARES—*Custom—Usages of the Stock Exchange, how far binding upon Persons employing Brokers to buy or sell thereon—Principal and Agent.*] One who employs a broker to transact business for him upon the stock-exchange or other general market, impliedly authorizes him to deal according to the general and known usages and customs of that market, although he may not himself be aware of their existence. But, when an usage or custom is intended to be relied upon, it ought to be clearly and distinctly proved to exist, and to be so general and notorious that persons dealing in the market could easily ascertain it, and must be presumed to be aware of it: and, in order to bind persons who were not aware of it, it must also appear to be a reasonable usage. The plaintiff was a holder of 80 shares in a company called Overend, Gurney, & Co., which were transferable, but by the rules of the company to complete the transfer a deed of transfer was required to be executed by both transferor and transferee, and to be registered,—such registration to be subject to the consent of the directors. On the 11th of May, 1866 (Overend, Gurney, & Co. having stopped payment on the 10th), one Barry, a stock-broker and member of the stock-exchange, sold these 80 shares, for the settling day, May 15th, to the defendants, who were stock-jobbers and also members of the stock-exchange,—the plaintiff's name not being disclosed to the defendants, nor the defendant's names to the plaintiff; but it was conceded that the defendants knew that Barry was a broker, and would assume that he was acting for a principal. On the settling day, Barry, in making up his account of transactions in Overend, Gurney, & Co.'s shares with the defendants since the previous settling day, was found to have bought of the defendants 205 more shares than he had sold to them; and, accordingly those 205 shares were transferred and delivered, not by the defendants, but by the holders (by the procurement of the defendants) to the nominees of Barry, in

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accordance with the course of business of the stock-exchange. The plaintiff's 80 shares were not transferred to the defendants or their nominees, but to persons named by others with whom Barry had had dealings. On the 17th of May, Barry sent the plaintiff four transfers of his shares to four different persons for execution, with the names of the transferees therein. These transfers the plaintiff executed and returned to Barry; but they were never executed or registered by the transferees. The following is in substance the evidence of the usage of the stock-exchange as to the setting off of purchases and sales of shares amongst the members:—On the settling day the buyer gives to the seller the name and address of the person to whom the shares are to be transferred, who is frequently a subsequent purchaser at a different price. The seller is bound to accept the name so given: and, when the shares are paid for, and a name given, the jobber is absolved from all further liability, and is not bound to see that the transfer of the shares is executed by the transferee, or that it is registerred, or to indemnify the seller against future calls. If the jobber fails to give a name, he is bound to accept a transfer of the shares himself. In consequence of the non-registration of the 80 shares in question, the plaintiff continued to be the registered holder of them, and was afterwards compelled to pay a call of 10*l.* per share thereon. Upon a special case setting out the above facts, from which the Court were to draw inferences, and to say whether or not the evidence of the usage was admissible or sufficient:—*Held*, by Bovill, C.J., and Willes and Keating, JJ., that the usage of the stock-exchange as to the setting off of shares as between the jobbers was not (even if proved by the above evidence, which they thought it was not) such a general, well-known, and reasonable custom or usage as to bind the plaintiff, and consequently that the defendants were liable under their contract for not having indemnified him against the subsequent call. *Held*, by Byles, J., that the usage was reasonable and sufficiently proved; and that the defendants, when they paid the price of the shares and gave the names of their nominees, had done all that their contract required them to do.

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2. SHARES, an equitable assignment of, is a bar to an attachment issuing out of the Mayor's Court 264
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3. ————, surrender of 407
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SHERIFF—*Interpleader Order—Security to the Satisfaction of the Master—Practice—Stamp.*] By an interpleader order, the sheriff was ordered to withdraw from possession of goods seized under a fi. fa. upon payment into court by the claimant of 50*l.*, or upon his giving security for that amount, to the satisfaction of the master. On the last day for giving security, the claimant's attorney, without giving notice to the execution-creditor, tendered to the master a bond with two sureties, at the same time untruly informing him that the sureties were approved by the execution-creditor. The master accepted the security; and the claimant's attorney, on the same day, gave the sheriff notice to withdraw, as security had been given pursuant to the interpleader order. The sheriff immediately withdrew from possession. It was afterwards on the same day discovered that the bond was unstamped, and notice of that fact was at once given to the claimant's attorney, and he on the following morning accompanied a messenger from the master's office to Somerset House with the bond, and got it stamped:—*Held*, that, as between the sheriff and the exe-

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cution-creditor, the sheriff was justified in withdrawing from possession.
DARBY *v.* WATERLOW AND ANOTHER 453

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SHIP AND SHIPPING—*Mortgage—Trover—Delivery of Goods—Lien for Wages—Money paid—Privity of Contract—Compulsory Payment of Debt of Another.*] A. being the owner of a steamship mortgaged it to B., and subsequently, under circumstances held to shew acquiescence by B., entered into an agreement in contemplation of a partnership with C., by the terms of which C. was to work the ship for A. till further notice, paying all the expenses and receiving all the profits, A. agreeing to indemnify him against loss, if any, upon a periodical statement of accounts. Subsequently to this agreement B. gave notice to C. of the mortgage, and required possession of the ship. The ship was being employed in voyages at a distance from England, between S. and T., and was at that time at S., under engagements which had been entered into by C. with third parties, with respect to its next voyage to T. The ship was given up to B.'s agent at T. at the termination of its next voyage thither. At the time of such delivery C. owed to the crew of the ship a large sum for wages, which entitled them to proceed against the ship in the Admiralty Court; and shortly after the delivery of the ship the crew took such proceedings, and the ship was seized by the officers of the Court. B., after suffering much delay and loss, paid the wages and obtained possession of the ship. In an action of trover for the ship, and for money paid, brought by B. against C.:—*Held*, that C. was entitled to retain possession of the ship till its arrival at T., in order to fulfil the engagements incurred before notice. *Held*, also, that as there had been a delivery of the ship at T., notwithstanding it was subject to a maritime lien for wages, A. was not entitled to recover on the count for trover. *Held*, also, that B. was entitled to recover the wages from C. under the count for money paid.
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2. ——————, *Wages—Appointment of a Seaman to be Mate.*] A. engaged to serve on board a ship as an able seaman for a long voyage out and back. The captain having died shortly after the ship left port, the first mate assumed the command, and appointed A. to act as second mate, and agreed with him that he should receive the pay of a second mate. The ship subsequently touched at several ports, and returned home, A. continuing to act throughout as second mate:—*Held*, that the agreement made with A. was binding on the shipowner, and that A. was entitled to wages as second mate.
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5. ——————, construction of "sufficient bags for broken stowage," in a charterparty 227
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9. ———————, construction of "barratry of the master or mariners," or "accidents or damage of the seas," in a bill of lading .. 476
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STAMP—*Bills of Exchange*—17 & 18 *Vict. c.* 83, *s.* 5—*Burden of Proof.* By 17 & 18 Vict. c. 83, s. 5, it is provided that no person shall be entitled to recover in an action brought on any foreign bill of exchange unless it had upon it at the time it was transferred to him the stamp required by the act. In an action on a foreign bill of exchange, the required stamp was upon the bill at the time of the trial, but no evidence was given to shew that it was on the bill at the time it was indorsed to the plaintiff:—*Held*, that it must be presumed to have been so, the contrary not having been shewn by the defendant.
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THAMES CONSERVANCY ACT, 1857 (20 & 21 VICT. C. CXLVII.), ss. 96, 97—*Merchant Shipping Act*, 1854 (17 & 18 *Vict. c.* 104, *s.* 388—*Statute—Repeal by Implication.*] A general enactment in a later statute does not repeal a particular enactment in an earlier statute, unless the intention to do so is manifest, or the implication irresistible. Section 388 of the Merchant Shipping Act, 1854, enacts that, no owner or master of any ship shall be answerable for any damage occasioned by the fault or incapacity of any qualified pilot acting in charge of such ship within any district where the employment of such pilot is compulsory. Section 96 of the Thames Conservancy Act, 1857, enacts that the owner of every vessel navigating the Thames shall be answerable for "all trespasses, damages, spoil, or mischief that shall be done by such vessel, or by any of the boatmen *or other persons* belonging to or employed in or about the same, by any means whatsoever, to any of the property or effects of the conservators," &c.; and that the owner of every such vessel shall, for every such trespass, &c., upon conviction before a justice, pay such compensation as shall be fixed by him not exceeding 20*l.*, besides costs; but that, in case the damage shall exceed 20*l.*, the owner may be sued. And s. 97 provides that the boatmen or other person so offending as aforesaid shall be answerable for and shall repay all such damages, &c., to his master or owner:—*Held*, that the owner of a vessel navigating the Thames is not responsible for damage done by her to property belonging to the conservators through the fault of a pilot compulsorily in charge of her; for that, though the words of s. 96 of the Thames Conservancy Act are general, they are not to be read as including pilots, and do not by implication repeal the provisions as to pilotage in the Merchant Shipping Act, 1854.
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TURNPIKE ACT—3 *Geo.* 4, *c.* 126, *s.* 32—*Exemption from Toll—Public Stores.*] By 3 Geo. 4, c. 126, s. 32, any waggon conveying commissariat stores for the use of her Majesty's forces, is exempt from toll. T., a contractor for the supply of forage for the use of her Majesty's forces at A., was bound by his agreement to keep at A. a supply of forage sufficient for at least fourteen days' consumption. The deputy commissary-general had a right to inspect the forage at the store, and reject all that was of inferior quality. A waggon belonging to T. was conveying forage to the store at A., bonâ fide intended to be there delivered in performance of the agreement, and for the use of her Majesty's forces:—*Held*, that the waggon was exempt from toll. *London and South Western Railway Company* v. *Reeves* (Law Rep. 1 C. P. 580), followed.
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USAGE—*Wool Broker—Principal and Agent.*] A usage in the wool trade in Liverpool, that, when a broker is employed to buy wool, he may either contract in the name of his principal, or, at the request of the seller, may (without communicating the fact to his principal) make himself personally responsible for the price:—*Held*, a good and reasonable usage.
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VENDOR AND PURCHASER—*Breach of Agreement—Forfeiture of Deposit—Liquidated Damages—I. O. U.*] An agreement for the purchase of a public-house, with fixtures, &c., contained the following stipulations: "And, as earnest of this agreement, the purchaser has paid into the hands of the vendor 50*l.*, which is to be allowed in part payment at the completion of this agreement. If the vendor shall not fulfil the same on his part, he shall return the deposit, in addition to the damages hereinafter stated: and, if the purchaser shall fail to perform his part of the agreement, then the deposit money shall become

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forfeited, in part of the following damages: and if either of the parties neglect or refuse to comply with any part of this agreement, he shall pay to the other 50*l.*, hereby mutually agreed upon to be the damages ascertained and fixed, on breach hereof." Instead of depositing the 50*l.*, the purchaser gave an I. O. U. for the amount. The purchaser failed to complete the purchase, and the vendor sold the public-house for 10*l.* less than the purchaser agreed to pay for it. In an action by the vendor against the purchaser for breach of the agreement, and upon the I. O. U.:—*Held*, that the plaintiff was entitled to recover the 50*l.*, and was not limited to the amount of damage he had actually sustained. *Semble*, that but for the clause for the forfeiture of the deposit, the 50*l.* would have been a penalty, and not liquidated damages.

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2. VENDOR AND PURCHASER—*Agreement for Sale of a Public-house —Transfer of Licences under* 9 *Geo.* 4, *c.* 61—*Parliament Roll.*] On the 17th of January, 1867, upon a contract for the sale of a public-house, the vendor agreed to make a proper assignment of the licences on the 5th of February, 1867, the day fixed for the completion of the contract, or as soon thereafter as might be. The business of the house had been carried on under the management, and under a licence granted under 9 Geo. 4, c. 61, in the name, of the vendor's son A., as servant to his father. In November, 1866, A. went to America, and had not since been heard of, and since that time, but without any transfer of the licence from A., the business had been continued under the management of B., another son of the vendor:—*Held*, that the vendor, not being able to obtain the indorsement of the licence by A., was not in a condition to perform his contract, and consequently that the purchaser might recover back his deposit and the expenses which he had incurred in and about the purchase. The marginal note to a section of a statute in the copy printed by the Queen's Printer, forms no part of the statute itself, and is not binding as an explanation or construction of the sections.

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END OF VOL. III.

LONDON: PRINTED BY WILLIAM CLOWES AND SONS, STAMFORD STREET AND CHARING CROSS.

PHIL. LONDON. UNIV.

UL 31 DEC 1957 Recovered